EDITOR'S NOTE

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88-5909

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

DOCK McKOY, JR., Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Dock McKoy, Jr., who is now confined on death row at Central Prison in Raleigh, North Carolina, seeks leave to file the attached Petition for Writ of Certiorari to the North Carolina Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to U.S. Sup. Ct. Rule 46, 28 U.S.C.

The Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Malcolm Ray Hunter, Jr.
Appellate Defender

David W. Dorey
Office of the Appellate Defender

Marshall Dayan
N.C. Death Penalty Resource Center

P.O. Box 1070
Raleigh, N.C. 27602
(919) 733-9490
ATTORNEYS FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

DOCK McKOY, JR., Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Dock McKoy, Jr., being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to pre-pay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I an entitled to redress; and that the issue which I desire to present on certiorari are the following:

1. Whether this Court's decision in Mills v. Maryland, 486 U.S. ___ (1988), applies to North Carolina?

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition are true.

1. Are you presently employed? No. My last employment was Anson Cty-DOT, 12/20 19~~88~~. and my salary was $520/mo.

2. I have received no income within the past twelve months from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources.

3. I own no cash or checking or savings accounts other than what is on account here at Central Prison. None

4. I own no real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. No one is dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Dock McKoy JR
Dock McKoy, Jr.

SWORN TO AND SUBSCRIBED before me, this 10 day of November, 1988.

Ray M. Coppedge
Notary Public

My commission expires: My Commission Expires 8-14-93

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

DOCK McKOY, JR., Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

Malcolm Ray Hunter, Jr.
Appellate Defender

COUNSEL OF RECORD

David W. Dorey
Assistant Appellate Defender

Office of the Appellate Defender
Post Office Box 1070
Raleigh, N.C. 27602
(919) 733-9490

Marshall Dayan

Robert Steven Mahler

N.C. Death Penalty Resource Center
Post Office Box 1070
Raleigh, N.C. 27602
(919) 733-9490

Of Counsel

QUESTION PRESENTED

DOES NORTH CAROLINA'S CAPITAL SENTENCING PROCEDURE, WHICH EXPLICITLY PRECLUDES JURORS FROM CONSIDERING MITIGATING EVIDENCE UNLESS ALL TWELVE JURORS UNANIMOUSLY FIND IT TO MAKE OUT A MITIGATING CIRCUMSTANCE, VIOLATE THIS COURT'S HOLDING IN *MILLS V. MARYLAND*, 486 U.S. ___ (1988)?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

DOCK McKOY, JR., Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

The Petitioner, Dock McKoy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered on September 27, 1988.

OPINION BELOW

The opinion of the North Carolina Supreme Court is officially reported at 323 N.C. 1, 372 S.E.2d 12 (1988), and is reproduced in Appendix "A" of this Petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina affirming Petitioner's conviction and sentence was entered on September 27, 1988.[1] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1257(3) (1982).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

---

[1] The opinion of the Supreme Court of North Carolina was filed on September 7, 1988. In accordance with Rule 32(b) of the North Carolina Rules of Appellate Procedure, the actual judgment of the Supreme Court of North Carolina is entered in the docket by the clerk twenty (20) days after the date of the filing of the opinion.

U.S. Const. amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV: No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

N.C. Gen. Stat. 15A-2000(b): . . . After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following factors: (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist; (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. . . .

STATEMENT OF THE CASE

On September 27, 1988, the Supreme Court of North Carolina entered judgment affirming Petitioner's conviction for first degree murder and his death sentence.

The state presented evidence at trial that on the afternoon of December 22, 1985, defendant was highly intoxicated and was firing a shotgun in a reckless manner. Sheriff's deputies were twice summoned to the rural neighborhood in which he resided. On the first occasion, a deputy attempted to converse with petitioner, but found him to be confused and incoherent. After informing petitioner that he was too drunk, should not fire his gun anymore, but could fire his gun in the woods when he sobered up, the officer left. Upon receiving a report of additional shots, other officers went to the scene. While attempting to convince petitioner to leave his home, a shot was fired from within the house killing one of the deputies.

The state's case was based in substantial part on inculpatory statements elicited from petitioner during custodial interrogation. Petitioner presented expert

testimony that he was legally insane at the time the shot was fired and, additionally, that he had been too intoxicated to form the requisite intent to kill.

At the penalty phase, the state presented evidence in support of two aggravating circumstances - that the victim had been a law enforcement officer, and that petitioner had been convicted of a prior felony involving violence; a 1951 conviction for second degree murder.

Petitioner presented evidence which was relevant to eight mitigating circumstances. That evidence included extensive expert testimony by two state employed forensic psychiatrists that petitioner was under the influence of severe and long standing psychological disorders at the time of the crime. Evidence was also offered concerning petitioner's borderline intelligence, the extent of his mental impairment due to intoxication, his age, and his poor physical health. The jury was expressly instructed that it must be unanimous in order to consider any mitigating circumstance. The jury failed to reach unanimous agreement as to six of the eight mitigating circumstances submitted by the trial court, including the statutory mitigating circumstance that petitioner was under the influence of mental or emotional disturbance at the time of the crime. N.C. Gen. Stat. sec. 15A-2000(f)(2).

On direct appeal to the North Carolina Supreme Court the defendant argued, among other things, that his Eighth and Fourteenth Amendment right to be free from cruel and unusual punishment was violated by North Carolina's procedure which expressly forbids jurors from considering mitigating evidence unless the jurors unanimously agree on the existence of mitigating circumstances relating to that evidence. After this Court issued its opinion in *Mills v. Maryland*, 486 U.S. ___ (1988), the North Carolina Supreme Court ordered supplemental briefing and additional argument solely on the question of whether North Carolina's procedure, employed in this case, runs afoul of *Mills*.

The North Carolina Supreme Court affirmed Petitioner's conviction and sentence of death. Relying on this Court's denial of writs of certiorari in two North

Carolina cases after the decision in *Mills*, and characterizing this Court's decision in *Mills* as having application only to Maryland's capital sentencing procedure, the North Carolina Supreme Court, in the instant case, was "unable to conclude with any degree of certainty that *Mills* rendered [the North Carolina] capital sentencing procedure constitutionally infirm." *State v. McKoy*, 323 N.C. 1, 44, 372 S.E.2d 12, 35 (1988). In dissent, the Chief Justice of the North Carolina Supreme Court noted this Court's cases holding that "the Eighth and Fourteenth Amendments preclude a state from creating barriers to the consideration by a capital sentencer of all evidence which may reasonably be said to have mitigating value," and described the majority's opinion as "stand[ing] *Mills* and the Eighth Amendment jurisprudence upon which it rests on their respective heads." *McKoy*, 323 N.C. at 54, 372 S.E.2d at 45 (1988) (Exum, C.J. dissenting).

The *McKoy* court stated four reasons, urged upon the court by the state, for its inability to conclude that *Mills* applies to North Carolina. First, the Supreme Court of North Carolina read this Court's opinion in *Mills* as applying only to Maryland's capital sentencing scheme. According to the majority of the North Carolina Supreme Court, this Court "granted certiorari in *Mills* '[b]ecause of the importance of the issue in Maryland's capital-punishment scheme.'" *McKoy*, 323 N.C. at 43, 372 S.E.2d at 35 (quoting *Mills v. Maryland*, 486 U.S. at ___ (citations omitted)). Therefore, the North Carolina Supreme Court determined that the decision in *Mills* was "statute-specific." *McKoy*, 323 N.C. at 43, 372 S.E.2d at 35.

Second, the North Carolina Supreme Court suggested that perhaps prohibiting the jury from considering mitigating evidence unless mitigating factors were unanimously found was unconstitutional only where, as in *Mills*, the jury must return a death sentence where aggravating circumstances are found and no factors in mitigation are found. *McKoy*, 323 N.C. at 40, 372 S.E.2d at 33.

Third, the North Carolina Supreme Court noted that, unlike the sentencing procedure condemned in *Mills*, under North Carolina's capital sentencing procedure

evidence of mitigation which is not unanimously found becomes irrelevant as a matter of state law. *McKoy*, 323 N.C. at 40-41, 372 S.E.2d at 33-35.

Finally, the North Carolina Supreme Court relied on this Court's denials of certiorari in *Holden v. North Carolina, cert. denied*, 486 U.S. ___, No. 87-6674 (June 13, 1988) and *Gardner v. North Carolina, cert. denied*, 486 U.S. ___, No. 87-6196 (June 13, 1988) the week after *Mills* was decided to strengthen its position that *Mills* was a statute-specific articulation of constitutional doctrine.

Interestingly, the *McKoy* opinion never affirmatively concluded that, in spite of *Mills*, the North Carolina unanimity requirement is constitutional. Rather, the Court held that factual differences in the respective capital sentencing schemes made it "unable to conclude with any degree of certainty that *Mills* rendered [the North Carolina] capital sentencing procedure constitutionally infirm." *McKoy*, 323 N.C. at 44, 372 S.E.2d at 35.

Three members of the North Carolina Supreme Court filed separate dissenting opinions. Justice Harry C. Martin disapproved of "the admission of inculpatory statements by a sixty-five year old black man with an I.Q. of 74, blind in one eye, his other eye injured and bandaged so that he could not see, wounded and treated at the hospital, with a blood alcohol level of .264, afraid for his life, travelling in a van with officers for over two hours from Anson County to Raleigh, at times cold and thirsty, suffering from his wounds, and being, in the opinion of [the clinical director of the state forensic psychiatry unit] incapable of appreciating the waiver of his constitutional rights." *State v. McKoy*, 323 N.C. at 63, 372 S.E.2d at 38 (Martin, J., dissenting). Justice Henry E. Frye and Chief Justice James G. Exum joined Justice Martin's dissent.

Writing separately, Justice Frye stated that he would also find reversible error based on the fact that "the trial judge both directly told the jury that its verdict was subject to appellate review and, subsequently, sanctioned the state's comments on that subject by overruling defendant's timely objection." *State v. McKoy*, 323 N.C.

at 59, 372 S.E.2d at 39-40 (Frye, J., dissenting). He also found error in allowing the state to secure commitments from jurors not to allow evidence of defendant's intoxication at the time of the crime to influence their verdicts and in allowing the prosecutor to remind jurors of that "promise" during his closing arguments in the penalty phase of the trial. Chief Justice Exum joined Justice Frye's dissenting opinion.

In his own dissenting opinion, in which Justice Frye joined, Chief Justice Exum reiterated his position, first enunciated in *State v. Kirkley*, 308 N.C. 196, 229-31, 302 S.E.2d 144, 163-64 (1983), that North Carolina's unanimity requirement ran afoul of this Court's Eighth Amendment requirement for individualized sentencing consideration of any relevant evidence relating to the character and record of the defendant, or the circumstances of the offense, which the defendant proffered as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 536 (1978). Indeed, Chief Justice Exum rebutted each of the majority's suggested distinctions between North Carolina's and Maryland's capital sentencing schemes, and concluded that these differences were not legally material.

> [w]hatever escape from the *Mills* holding might be provided by differences in Maryland's and North Carolina's capital sentencing scheme or by the posture in which the *Mills* case reached the Supreme Court is effectively closed, it seems to me, by the rationale of the *Mills* decision as expressed in the opinion itself.

McKoy, 323 N.C. at 51, 372 S.E.2d at 43 (Exum, C.J. dissenting).

Chief Justice Exum rejected the majority's rationale -- that North Carolina's unanimity requirement is a mechanism by which the jury determines the legal relevance of proffered mitigating evidence -- as a device created in an effort to take advantage of footnote 7 in *Mills*.[2]

---

[2] In support of its rationale, the *McKoy* majority relied upon footnote 7 of this Court's opinion in *Mills*, which reads: "[n]o one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered 'legally irrelevant' by one holdout vote." *Mills v. Maryland*, 486 U.S. at ___, fn.7.

> [T]he question presented in *Mills* is whether at the ultimate decision-making stage of a capital sentencing proceeding it is constitutionally permissible to preclude any juror from considering [a] mitigating circumstance that juror believes to exist because not all jurors agree on its existence. *Mills* answers that question 'no.' It also makes clear that the question must be answered 'no' notwithstanding any procedural devices a state may employ to preclude the sentencer's consideration of mitigating factors at the ultimate decision-making stage. This means to me that North Carolina cannot preclude jurors from considering mitigating evidence at that stage by labeling the evidence legally irrelevant.

McKoy, 323 N.C. at 56, 372 S.E.2d at 46 (Exum, C.J. dissenting).

REASONS FOR GRANTING THE WRIT

Under North Carolina's capital sentencing procedure, jurors are expressly forbidden to give consideration to mitigating evidence unless all twelve jurors unanimously "find" the existence of mitigating circumstances relating to that evidence. Thus, a single holdout juror can preclude consideration of all mitigating evidence, even if eleven jurors believe that the evidence mandates sparing the defendant's life. This squarely violates this Court's decision in *Mills v. Maryland*, 486 U.S. ___ (1988).

This remains the procedure in North Carolina in spite of this Court's decision in *Mills*. It remains the procedure in spite of this Court's action in *Lloyd v. North Carolina*, ___ U.S. ___, No. 88-6833, (October 3, 1988), in which certiorari was granted, the judgment of the North Carolina Supreme Court was vacated, and the case was remanded to the state court for further consideration in light of *Mills*. Three days after this Court's disposition of *Lloyd*, and with full knowledge of this Court's action in *Lloyd*, the North Carolina Supreme Court affirmed a death sentence in another case raising the constitutionality of the unanimity requirement as to mitigating evidence, basing its decision on its opinion in the instant case. *State v. Allen*, No. 70A86, slip op. at 27 (A copy of the Court's opinion in *Allen* is attached as Appendix "C"). Indeed, subsequent to this Court's action in *Lloyd* the North

Carolina Supreme Court has affirmed four death sentences in addition to *Allen*. In each case the *Mills* defect was raised and rejected. *State v. Cummings*, No. 65A87, slip op. (October 6, 1988); *State v. Hunt*, No. 5A86, slip op. (November 3, 1988); *State v. Barnes*, No. 5A86, slip op. (November 3, 1988); *State v. Fullwood*, No. 37A86, slip op. (November 3, 1988). This issue is of fundamental importance to North Carolina's capital sentencing scheme, and the North Carolina Supreme Court appears to be intractable in declining to follow the straightforward dictates of this Court's Eighth Amendment jurisprudence. If North Carolina's unconstitutional practice is to be cured, apparently it will have to be done by this Court.

I. THE HOLDING OF MILLS V. MARYLAND APPLIES TO NORTH CAROLINA'S CAPITAL SENTENCING PROCEDURE

A. SUMMARY OF NORTH CAROLINA'S CAPITAL SENTENCING PROCEDURE

North Carolina's capital sentencing scheme requires the capital sentencing jury to deliberate on four questions before it can render a sentence of death. First, the jury must unanimously agree that the State has proved at least one aggravating circumstance beyond a reasonable doubt, and must deliberate as to each aggravating circumstance submitted to it by the court. Second, the jury must unanimously decide whether the defendant has unanimously proved by a preponderance of the evidence any of the mitigating circumstances submitted to it by the court. Third, the jury must unanimously determine beyond a reasonable doubt that the mitigating circumstances found to exist do not outweigh the aggravating circumstances found to exist. Finally, the jury must unanimously determine beyond a reasonable doubt that the aggravating circumstances found to exist are sufficiently substantial, when considered in light of the mitigating circumstances found to exist, to warrant the imposition of the death penalty. N.C. Gen. Stat. sec. 15A-2000; *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983).

B. MILLS'S APPLICATION TO NORTH CAROLINA

The instructions and verdict sheet were such that a reasonable juror in this case would have concluded that no piece of mitigating evidence proffered by McKoy could be considered in McKoy's favor in the sentencing decision unless it was first found by all twelve jurors to make out a mitigating circumstance. For that reason, Petitioner was sentenced in violation of *Mills*. One fact makes the issue here markedly simpler than in *Mills*. In North Carolina, it is the law that a capital sentencing jury must "unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." *State v. Kirkley*, 308 N.C. at 218, 302 S.E.2d at 157.

Examination of the instructions and issue sheet underscores the point. When the jurors in this case turned to the question of mitigating circumstances in Issue Two, this is what they saw:

> Issue Two: Do you *unanimously find* from the evidence the existence of one or more of the following mitigating circumstances?
>
> Answer: _____

> BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES, IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, **WRITE "YES", IF YOU UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE** BY A PREPONDERANCE OF THE EVIDENCE. **WRITE "NO", IF YOU DO NOT UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE** BY A PREPONDERANCE OF THE EVIDENCE.
>
> IF YOU WRITE "YES", IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE "YES", IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE "NO", IN ALL OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "NO", IN THE SPACE AFTER ISSUE TWO.
>
> 1. This murder was committed while Dock McKoy was under the influence of mental or emotional disturbance.
>
> Answer: _____
>
> 2. The capacity of Dock McKoy to apprecaite [sic] the criminality of his conduct or

to conform his conduct to the requirements of law was impaired.

Answer: _____

3. The age of Dock McKoy at the time of this murder is a mitigating circumstance.

Answer: _____

4. That for several decades Dock McKoy has exhibited signs of mental or emotional disturbance or defect that went untreated.

Answer: _____

5. That Dock McKoy has borderline intellectual functioning with a IQ score of 74.

Answer: _____

6. That Dock McKoy's mental and emotional disturbance is aggravated by his poor physical health.

Answer: _____

7. Dock McKoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

Answer: _____

8. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

Answer: _____

(Appendix "B", attached).

These directions are unambiguous. The jurors were to answer "yes" only if they unanimously agreed that a particular mitigating factor had been proved by a preponderance of the evidence. If they failed to unanimously agree that the circumstance existed, they were required to answer "no."

Having unanimously found two of eight mitigating circumstances to exist, the jury then turned its attention to Issue Three. Having done so, they saw the following:

Issue Three: Do you[3] **unanimously find** beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

Answer: _____

IF YOU ANSWER ISSUE THREE, "NO", INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES", PROCEED TO ISSUE FOUR.

(Appendix "B", attached).

"Under such circumstances, the lack of unanimity would have prevented the jury from marking that answer 'yes.' Regardless of whether the answer was marked 'no' or left blank, the instructions in Section III would prevent those jurors who thought [McKoy]'s [mental or emotion disturbance] was relevant to the ultimate sentencing decision from giving that mitigating circumstance any weight." *Mills*, 486 U.S. at ___, n.14.

Following the instructions at issue, McKoy's jury, after finding that the mitigating circumstances did not outweigh the aggravating circumstances, proceeded to Issue Four, which provided:

Issue Four: Do you **unanimously find** beyond a reasonable doubt that the aggravating circumstance or circumstances **found by you** is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances **found by you**.

Answer: _____

IF YOU ANSWER ISSUE FOUR, "NO", INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF

---

[3] The word "you" clearly is used in its plural form throughout the jury charge and is intended to be synonymous with "members of the jury." The singular usage is grammatically incompatible within the context of sentences such as, "If the evidence unanimously satisfies *you* that a mitigating circumstance exists, then *you* would find that mitigating circumstance." An individual juror cannot be unanimously satisfied about anything. Certainly it would be reasonable for a juror to assume, absent some indication to the contrary, that the pronoun was consistently intended to refer to the jury as a whole.

THIS FORM. IF YOU ANSWER ISSUE FOUR "YES", INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

(Appendix "B", attached).

If the jurors in this case remained true to their oaths and the words on the issue sheet--an assumption that has to be made--then the jurors were duty bound to consider only the mitigating evidence related to mitigating circumstances unanimously found by all twelve jurors. As in *Mills*, even a lone holdout could preclude other jurors from considering the evidence as a mitigating circumstance in the sentencing determination. That, *Mills* squarely holds, violates the doctrine of *Lockett v. Ohio* because "there is a substantial probability that reasonable jurors ... well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at ___, No. 87-5367, slip op. at 15.

Because it is impossible to conclude that no reasonable juror might read Issue Four as precluding the consideration of non-unanimous mitigating circumstances, the conclusion that *Mills* controls this case is unavoidable. Dock McKoy's death sentence accordingly is cruel and unusual punishment.

II. THE MCKOY COURT'S ATTEMPTS TO DISTINGUISH MILLS ARE UNAVAILING

A. THIS COURT'S DENIALS OF THE WRIT OF CERTIORARI CANNOT BE A BASIS FOR A STATE COURT TO IGNORE CONTROLLING CONSTITUTIONAL DOCTRINE

The *McKoy* opinion suggested that this Court implied something deeply revealing from its denials of the writ of certiorari in the cases of *Holden v. North Carolina, cert. denied*, 486 U.S. ___, No. 87-6674 (June 13, 1988) and *Gardner v. North Carolina, cert. denied*, 486 U.S. ___, No. 87-6196 (June 13, 1988). *McKoy*, 323 N.C. at 43, 372 S.E.2d at 35. To the extent that this Court in *Lloyd v. North*

Carolina, cert. granted, vacated and remanded, ___ U.S. ___, No. 88-6833 (1988) granted certiorari, vacated the judgment of the North Carolina Supreme Court, and remanded the case to the state court in light of *Mills*, such an inappropriate inference no longer deserves any weight. *See generally Vasquez v. United States*, 454 U.S. 975 (1981) (cited in Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th Ed. 1986) (denials of certiorari should be given no consideration because practical considerations make it impossible for the Court to explain its reasons for such denials)

Oddly, despite its reliance on this Court's denials of certiorari to affirm McKoy's death sentence, the North Carolina Supreme Court has given no weight at all to this Court's decision in *Lloyd*. Three days after this Court filed its order in *Lloyd*, and with full knowledge of this Court's action in *Lloyd*, the North Carolina Supreme Court decided another case which raised the question of the effect of *Mills--State v. Allen*, No. 70A86, slip op. (N.C. October 6, 1988). The response of the North Carolina Supreme Court to the *Lloyd* order was to reject Allen's *Mills* claim based on its earlier decision in *McKoy*, as though *Lloyd* had not occurred. *Allen, id.* at 27.

In dissent, Chief Justice Exum noted that the Petitioner in *Lloyd* had apprised this Court, by way of a supplemental brief, of the North Carolina Supreme Court's decision in *McKoy*; Chief Justice Exum concluded, therefore, that "[t]he *Lloyd* order, considered with the filings upon which it rests, render the conclusion reached in *McKoy*--that *Mills* has no application to North Carolina's unanimity jury instructions--far more untenable than it otherwise was." *Allen, id.* at 3 (Exum, C.J. dissenting).

B. A UNANIMITY REQUIREMENT WHICH PRECLUDES JURY CONSIDERATION OF MITIGATING EVIDENCE IS NO LESS UNCONSTITUTIONAL BECAUSE THE SENTENCER MAY IMPOSE A SENTENCE LESS THAN DEATH ON A BASIS OTHER THAN MITIGATING EVIDENCE

The majority opinion in *McKoy* noted a difference between North Carolina's capital sentencing scheme and the Maryland capital sentencing scheme at issue in *Mills*. Based on this difference, the *McKoy* court suggested that the *Mills* decision of this Court was "statute-specific." *McKoy*, 323 N.C. at 43, 372 S.E.2d at 35. The difference noted is that while Ralph Mills's jury was forced to impose the death sentence because it found factors in aggravation but none in mitigation, the identical process is not employed in North Carolina, even though the same result could occur.

First, this distinction misapprehends the holding of *Mills*. Though Ralph Mills's jury was required to impose the death penalty under Maryland law because it found factors in aggravation but none in mitigation, mandatoriness was not the concern expressed by the *Mills* Court. The *McKoy* opinion implies that this Court would have reached a different result had Mills's jury unanimously found a single mitigating factor. But, as Chief Justice Exum noted in dissent, a situation in which both aggravating and mitigating circumstances were found by the jury was considered by this Court in *Mills*, and resolved in Petitioner's favor. *McKoy*, 323 N.C. at 54, 372 S.E.2d at 44-45, (Exum, C.J. dissenting), *citing Mills*, 486 U.S. at ___, slip op. at 12, n.14.

Rather, the Court focused on the unanimity requirement before jurors could consider mitigating evidence in the ultimate determination as to whether or not the defendant should be sentenced to death. As the *Mills* Court noted, "it would certainly be the height of arbitrariness **to allow** or require the imposition of the death penalty" where a single juror may preclude the consideration of mitigation by other jurors. *Mills*, 486 U.S. ___, ___, slip op. at 6 (emphasis added). Even if the sentencer is free to return a sentence less than death on some basis other than

mitigation, before a person may be constitutionally sentenced to death, the sentencer must consider all relevant evidence in mitigation. *Mills*, *id*.

Additionally, in spite of the fourth question as to the sufficiency of the factors found in aggravation, North Carolina juries do not have the option of recommending a life sentence notwithstanding the outcome of their deliberations on specific aggravating or mitigating factors. Rather, once a North Carolina jury has concluded that aggravating circumstances are not outweighed by mitigating circumstances, and that the aggravating circumstances unanimously found, when considered with the mitigating circumstances unanimously found, are sufficiently substantial to warrant the imposition of the death penalty, that jury is instructed that it must recommend the death sentence. *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 569, *cert. denied*, 459 U.S. 1056 (1982). In short, North Carolina juries are permitted to give no more consideration to mitigating evidence than did Ralph Mills's jury.

C. MITIGATING FACTORS RELATED TO THE CHARACTER AND RECORD OF THE DEFENDANT, OR TO THE CIRCUMSTANCES OF THE OFFENSE, MAY NOT BE PRECLUDED FROM CONSIDERATION AT THE PENALTY PHASE OF A CAPITAL MURDER TRIAL BY CALLING THEM "IRRELEVANT" WHEN NOT UNANIMOUSLY FOUND TO EXIST

The majority opinion in *McKoy* seized upon a footnote in this Court's opinion in *Mills* to suggest a distinction between Maryland's capital sentencing procedure and North Carolina's which it said might render *Mills* inapplicable to North Carolina. *McKoy*, 323 N.C. at 41, 372 S.E.2d at 34. After reiterating the doctrine enunciated in *Lockett v. Ohio*, 438 U.S. 586 (1978), this Court in *Mills* explained in a footnote that neither party argued, "nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered legally 'irrelevant' by one holdout vote." *Mills*, 486 U.S. at ___, n.7, slip op. at 6, n.7.

The *McKoy* majority held that mitigating evidence **ceases to be legally relevant if it is not unanimously found by the jury**, and subsequently has no further

role in the sentencing scheme. *McKoy*, 323 N.C. at 40-41, 372 S.E.2d at 33-34. Under North Carolina law, the unanimity requirement is a device by which the jury determines what evidence is legally relevant, a device by which a single holdout vote can render mitigating evidence irrelevant.[4]

This new approach, erecting an obstacle to preclude the consideration of mitigating evidence under the guise of a state law relevancy determination, has already twice failed to pass constitutional muster. *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982). Were states to be able to circumvent the *Lockett* doctrine merely by characterizing proffered mitigating evidence as "irrelevant", the *Lockett* doctrine would be effectively obliterated.

The flaws in the Court's opinion in *McKoy* did not go unnoticed. In dissent, Chief Justice Exum lamented the "relevancy" holding of the *McKoy* majority, writing that

> "[w]hether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. [. . .] To say, as the majority does here, that jury unanimity on a mitigating factor is necessary to make that factor legally relevant in the final balancing process seems not only to be a misuse of the concept of relevancy but also a classical case of circular reasoning with regard to the constitutional question presented."

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[4] This is a novel construction of state law. In previously upholding the unanimity requirement, the North Carolina Supreme Court had held that the Eighth Amendment is satisfied by merely allowing jurors to consider mitigating evidence when deciding whether a mitigating circumstance exists. *State v. Kirkley*, 308 N.C. 196, 219, 302 S.E.2d 144, 156-57 (1983). This is in accord with the North Carolina Supreme Court's holding that our capital sentencing scheme provides, "in conformity with the constitutional mandates of the Eighth and Fourteenth Amendments, that any evidence may be presented at the separate sentencing hearing **which the court deems** 'relevant to sentence' or 'to have probative value,' including matters related to aggravating or mitigating circumstances." *State v. Pinch*, 306 N.C. 1, 19, 292 S.E.2d 203, 219 (1982) (citations omitted) (emphasis in original).

Until *McKoy*, the law in North Carolina was clear that "[t]he competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury." 1 H. Brandis on NORTH CAROLINA EVIDENCE, sec. 8, n.7 (3rd ed. 1988), *citing Queen City Coach Co. v. Lee*, 218 N.C. 320, 11 S.E.2d 341 (1940). *See, generally*, N.C. R. EVID. 103(c), 402. In North Carolina, capital defendants bear a burden of proving by a preponderance that mitigating evidence should be given credibility, probative force, and weight. *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980).

McKoy, 323 N.C. at 56, 372 S.E.2d at 45 (Exum, C.J. dissenting).

Moreover, the Eighth Amendment is not satisfied merely by permitting consideration of mitigating evidence in determining whether mitigating circumstances exist. As Chief Justice Exum noted in dissent, "[t]here is no question that all jurors were permitted to consider such evidence at that [earlier] stage of the process in *Mills*." *McKoy*, 323 N.C. at 56, 372 S.E.2d at 46.

The footnote in *Mills* upon which the North Carolina Supreme Court places such great reliance, *Mills v. Maryland*, 486 U.S. ___, ___, n.7, provides no support for avoiding the application of *Mills*. A single holdout juror may not render mitigating evidence legally irrelevant as a matter of constitutional law. *Mills*, 486 U.S. at ___, slip op. at 7. Even assuming there is some method by which the states may define the relevance of mitigation,[5] it is clear they may not do so by means of a unanimity requirement. As this Court stated in *Mills*,

> "it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by the sentencing court, or by an evidentiary ruling. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, . . . the conclusion would necessarily be the same: 'Because the sentencer's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.'" *Mills*, 486 U.S. at ___, slip op. at 7 (citations omitted).

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[5] The *McKoy* Court's conclusion that the consideration of mitigating evidence may be constitutionally precluded erroneously relied on this Court's decision in *Franklin v. Lynaugh*, 486 U.S. ___ (1988). However, the question presented and discussed in *Franklin* provides no support for North Carolina's interpretation because the Texas scheme at issue does not preclude all consideration of mitigating evidence; rather, it narrows the function of mitigation. The claim presented in *Franklin*, and again in *Penry v. Lynaugh*, *cert. granted*, ___ U.S. ___ (1988) is whether, as a matter of constitutional law, a state may channel the jury's ability to give effect to evidence related to the character and background of the defendant which does not apply as a mitigating factor to any of Texas' three special sentencing questions. Under Texas law, jurors are not precluded from considering mitigating evidence that has been presented; rather, their consideration of the mitigating evidence must be filtered through these statutory questions.

The line of cases which enunciate the Eighth Amendment jurisprudence as to mitigating evidence and individualized sentencing considerations in death penalty cases has uniformly defined "relevance" as that term relates to mitigating evidence as any evidence related to the defendant's character or record, or to the circumstances of the offense, that the defendant proffers as a basis for a sentence less than death. *See Woodson v. North Carolina*, 428 U.S. 280, 303 (1976); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *Green v. Georgia*, 442 U.S. 95, 97 (1979); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 6 (1986); *California v. Brown*, 479 U.S. ___, ___ (1987) (O'Connor, J. concurring); *Mills v. Maryland*, 486 U.S. ___, ___ (1988); *Franklin v. Lynaugh*, 486 U.S. ___ (1988) (O'Connor, J. concurring).

In the instant case, the jury failed to reach unanimous agreement as to the existence of six of the eight mitigating circumstances submitted to them. Under North Carolina law, that outcome precluded any juror from giving weight to or otherwise considering the evidence underlying those circumstances in deciding whether defendant should live or die.

The evidence at issue was critically important to defendant's case for a sentence less than death. For example, two state employed forensic psychiatrists presented extensive and uncontradicted testimony that defendant was suffering from severe and longstanding psychological disorders at the time he fired the fatal shot. That evidence is ". . . relevant because of the belief that defendants who commit criminal acts that are attributable to . . . emotional and mental problems may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. ___, ___ (O'Connor, J. concurring). That same evidence was rendered "irrelevant", however, because the jury failed to reach unanimity as to the statutory circumstance that the murder was committed while the defendant was under the influence of mental or emotional disturbance. N.C.Gen. Stat. sec. 15A-2000(f)(2).

As interpreted by the North Carolina Supreme Court in *McKoy*, the North Carolina capital sentencing scheme renders as irrelevant mitigating evidence not

unanimously found by the jury and precludes such evidence from consideration at the penalty phase of a capital murder trial. For that reason it is unconstitutional. *Mills v. Maryland*, 486 U.S. ___ (1988).

CONCLUSION

Therefore, the Petitioner respectfully requests that this Court grant the petition, issue the writ of certiorari, and summarily reverse the sentence of death in light of *Mills v. Maryland*, 486 U.S. ___ (1988). Alternatively, the Petitioner respectfully requests that this Court grant the Petition, vacate the North Carolina Supreme Court decision as to Petitioner's sentence, and remand the case to the North Carolina Supreme Court for further consideration in light of *Lloyd v. North Carolina*, 486 U.S. ___ (1988).

Respectfully submitted,

Malcolm Ray Hunter Jr
MALCOLM RAY HUNTER, JR.

N.C. Appellate Defender
Post Office Box 1070
Raleigh, North Carolina 27602
(919) 733-9490

DAVID W. DOREY

Assistant Appellate Defender
Post Office Box 1070
Raleigh, North Carolina 27602
(919) 733-9490

Robt S Mahler 1/26
ROBERT S. MAHLER

Marshall Dayan
MARSHALL DAYAN

North Carolina Death Penalty
Resource Center
Post Office Box 1070
Raleigh, NC 27602
(919)733-9490

OF COUNSEL

APPENDIX "A"

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. DOCK McKOY, JR., a/k/a DOCK McCOY, a/k/a DOCK McKAY, a/k/a PAUL McCOY

No. 585A85

(Filed 7 September 1988) ✓

1. **Criminal Law §§ 102.13, 128.1— capital case—comments by trial court and prosecutor on appellate review**

The trial court's statement during a routine explanation of the court reporter's duties that "the Supreme Court can review" this case, and the prosecutor's jury argument that defendant, if convicted, can appeal questions of law but not the jury's findings of fact, could not reasonably be construed to diminish the jury's responsibility for its decisions and thus did not fatally undermine the jury's verdict of guilty of first degree murder and its conclusion that death is the appropriate punishment.

2. **Jury § 6.3— voir dire of prospective jurors—sympathy toward intoxicated defendant**

The trial court did not abuse its discretion by failing *ex mero motu* to prohibit the prosecutor in a first degree murder case from asking several prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense, since the questions did not tend to "stake out" the jurors as to their potential verdict or how they would vote under a given state of facts but were properly allowed in the exercise of the prosecutor's right to secure an unbiased jury.

3. **Criminal Law § 75.10— refusal to sign written waiver of rights—oral waiver**

The trial court's finding that defendant made an express waiver of his rights before interrogation was supported by an S.B.I. agent's testimony that defendant refused to sign a written waiver because he could not see it but stated that he understood his rights and agreed to talk with the officers.

4. **Criminal Law § 75.5— no expressed desire to terminate interview—supporting evidence**

The trial court's finding that defendant never expressed a desire to terminate an interview was supported by an S.B.I. agent's testimony that defendant asked to take a break because he was tired and that defendant subsequently agreed to resume the conversation.

5. **Criminal Law § 75— voluntariness of confession and waiver of rights—totality of circumstances—necessity for police coercion**

The appellate court will look to the totality of circumstances in determining the voluntariness of a confession and the waiver of *Miranda* rights. However, police coercion is a necessary predicate to a determination that a waiver or statement was not given voluntarily within the meaning of the due process clause of the Fourth Amendment.

6. **Criminal Law § 75.10— voluntariness of waiver of rights and confession—previous convictions**

A finding that defendant had previously been convicted of two felonies and that he told an officer that, because of this experience, he understood "all that stuff" (*i.e.*, his rights) supported the conclusion that defendant's waiver of his rights and his confession were voluntary.

7. **Criminal Law § 75.15— voluntariness of confession—mild intoxication**

The fact that defendant may have experienced some lingering, mild intoxication at the time of his confession does not preclude the conclusion that he confessed voluntarily. Rather, defendant's intoxication was relevant to his credibility, which was a question for the jury.

8. **Criminal Law § 75.14— low I.Q.—voluntariness of confession**

Although a psychiatrist testified that defendant's I.Q. placed him in the borderline range of intellectual functioning, the evidence permitted a conclusion that defendant had sufficient mental capacity to waive his rights and voluntarily confess where it showed that defendant spoke rationally during his extensive conversation with officers; he held a job prior to the shooting in question and was described by his supervisor as a good worker; and he had the mental capacity to testify at trial.

9. **Criminal Law § 75.14— mental disorders—voluntariness of confession—conflicting psychiatric and lay testimony**

A psychiatrist's testimony that defendant's mental disorders would prevent him from making a truly voluntary confession did not preclude a conclusion that defendant's mental disorders did not prevent his making a voluntary confession where an S.B.I. agent, who had ample opportunity to observe defendant at the time he waived his rights and confessed, gave substantial testimony indicating that defendant was able to comprehend his discussion with law officers.

10. **Criminal Law § 75.10— voluntariness of waiver of rights and confession—totality of circumstances**

The totality of the circumstances permitted the trial court's conclusion that defendant knowingly, intelligently, and voluntarily waived his *Miranda*

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...circumstances permitted the trial court's conclusion
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rights and that his in-custody statements were made freely, understandingly, and voluntarily.

11. Criminal Law § 102.7 — jury argument concerning psychiatrist — absence of prejudice

The trial court did not abuse its discretion in overruling defendant's objection to the prosecutor's potentially misleading jury argument in a first degree murder case that "if the law recognized them [psychiatrists] as the experts on what the condition of somebody's mind was, you wouldn't be hearing the case" where the prosecutor went on to state correctly that the law permits hearing from the experts and considering what they have to say, and he then urged the jurors to consider not only the expert testimony but also that of the other witnesses.

12. Criminal Law § 102.6 — jury argument — competency to stand trial as evidence of sanity

The trial court did not abuse its discretion in overruling defendant's objection to the prosecutor's jury argument suggesting that the fact that defendant was competent to stand trial indicated that his sanity defense lacked merit since the argument did not misstate the law but in effect urged the jury to consider evidence of defendant's state of mind at the time of trial in passing upon his state of mind at the time of the crime, and since the trial court gave clear and correct instructions on insanity.

13. Criminal Law § 102.6 — jury argument — misstatement of law as one interpretation — objection sustained

The trial court did not abuse its discretion in sustaining the State's objection to defense counsel's jury argument that, in order to convict defendant of first degree murder, the jury would have to find that a psychiatrist who testified that defendant lacked the mental capacity to premeditate and deliberate at the time of the crime "was wrong about it beyond a reasonable doubt," since the argument could have been interpreted as stating the correct proposition that the State bore the burden of proving beyond a reasonable doubt the premeditation and deliberation element of first degree murder or as incorrectly implying that the State bore the burden of proving the insanity defense. Assuming error, defendant failed to carry his burden of showing prejudice where the trial court's charge correctly and unambiguously emphasized the State's burden of proving premeditation and deliberation beyond a reasonable doubt.

14. Criminal Law § 135.9 — emotional disturbance mitigating circumstance — jury's failure to find — defendant's expert testimony not uncontradicted or inherently credible

The testimony of defendant's two psychiatric experts that defendant was suffering from significant psychological disorders at the time of a shooting was neither uncontradicted nor inherently credible so as to make the sentencing determination unreliable because of the jury's failure to find the statutory mitigating circumstance that "defendant was under the influence of mental or emotional disturbance" where the testimony of other witnesses regarding defendant's mental and emotional state at the time of the shooting conflicted

with that of defendant's experts, and where neither of defendant's experts examined him until several weeks or months after the crime. N.C.G.S. § 15A-2000(b)(2) (1988); Eighth and Fourteenth Amendments to the U. S. Constitution.

15. Criminal Law § 102.6 — jury argument — commitment not to sympathize with intoxicated defendant

The trial court in a first degree murder case did not abuse its discretion by failing to intervene ex mero motu when the district attorney reminded the jurors during his closing argument of their commitments not to have sympathy for defendant because he was intoxicated.

16. Criminal Law § 135.9 — capital sentencing procedure — mitigating circumstances — requirement of jury unanimity — constitutionality

The trial court's sentencing instructions in a first degree murder case were not erroneous and unconstitutional under the decision of *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 because they required jury unanimity on the existence of a mitigating circumstance before that circumstance could be considered for the purpose of sentencing.

17. Criminal Law § 135.4 — capital sentencing procedure — individualized sentencing and guided sentencer discretion — constitutionality

The North Carolina capital sentencing procedure allows for individualized sentencing by (1) allowing the jury to find circumstances in mitigation, both submitted circumstances and any other circumstances the jury deems to have mitigating value, (2) allowing the jury to consider all relevant evidence in deciding whether to recommend a sentence of death, and (3) requiring the jury, before recommending that defendant be sentenced to death, to weigh the "found" aggravating and "found" mitigating circumstances and to decide whether the "found" aggravating circumstances, considered with the "found" mitigating circumstances, are sufficiently substantial to call for the death penalty. The capital sentencing procedure also guides the jury's discretion so as to guard against the arbitrary and capricious infliction of the death penalty by (1) requiring the State to prove the existence of an aggravating circumstance beyond a reasonable doubt, (2) requiring the defendant to prove the existence of a mitigating circumstance by a preponderance of the evidence, and (3) then allowing the jury to consider only that evidence which is relevant, i.e., the evidence which the jury had unanimously "found," in sentencing the defendant. The capital sentencing procedure thus provides a proper balance between individualized sentencing and guided discretion in conformity with federal constitutional requirements.

18. Criminal Law § 135.5 — capital case — aggravating factors relied on — no right to disclosure

The trial court in a capital case did not err in denying defendant's motion to require the State to disclose potential aggravating circumstances it intended to rely upon at sentencing.

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19. Criminal Law § 138.9— capital case—mitigating circumstances—burden of proof

The trial court in a capital case did not err in placing the burden of proving the *ex mero* of mitigating circumstances on defendant rather than on the State.

20. Criminal Law § 138.7— capital case—affirmative answer to issue four—death penalty required

The trial court did not err in instructing the jury in a capital case that it must recommend a death sentence if it answered issue four affirmatively.

21. Criminal Law § 138.2— prior violent felony aggravating circumstance—constitutionality

The aggravating circumstance that defendant had a prior conviction of a felony involving the use or threat of violence to the person is not unconstitutionally vague and overbroad either facially or as applied in this case.

22. Criminal Law § 138.10— first degree murder—death penalty not disproportionate

A sentence of death imposed upon defendant for first degree murder was not disproportionate or excessive, considering both the crime and the defendant, where the crime was committed against a law officer while he was engaged in his official duties; the killing followed a considerable period during which law officers and a neighbor attempted to persuade defendant to stop randomly shooting his gun and after defendant told the officer to "leave or I'll kill you"; and the jury found that defendant had previously been convicted of a felony involving the use of violence to the person in that he had pled guilty to second degree murder.

Chief Justice Exum *dissenting.*

Justice Frye *joins in this dissenting opinion.*

Justice Frye *dissenting.*

Chief Justice Exum *joins in this dissenting opinion.*

Justice Martin *dissenting in part.*

Chief Justice Exum *and Justice* Frye *join in this dissenting opinion.*

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence entered by *Freeman, J.*, at the 29 July 1985 session of Superior Court, STANLY County. Heard in the Supreme Court 14 March 1988; additional arguments heard 22 August 1988.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State (original brief and argument); Lacy H. Thornburg, Attorney General, James J. Coman, Senior Deputy Attorney General, William N. Farrell, Jr., Special Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, Steven F. Bryant, Assistant Attorney General, and Barry S. McNeill, Assistant Attorney General, for the State (supplemental brief and argument).

Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant-appellant (original brief and argument); Malcolm Ray Hunter, Jr., Appellate Defender, and Louis D. Bilionis, for defendant-appellant (supplemental brief and argument).

E. Ann Christian and Robert E. Zaytoun for North Carolina Academy of Trial Lawyers, amicus curiae.

John A. Dusenbury, Jr., for North Carolina Association of Black Lawyers, amicus curiae.

WHICHARD, Justice.

Defendant was convicted of the first degree murder of Deputy William Kress Horne of the Anson County Sheriff's Department. The jury found as aggravating circumstances that defendant previously had been convicted of a felony involving violence and that the murder was committed against a deputy sheriff while engaged in the performance of official duties. It found as mitigating circumstances that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired and that defendant has borderline intellectual functioning.

The jury recommended the death penalty, and the trial court sentenced accordingly. We find no error.

Haywood Haskell lived beside defendant outside of Wadesboro. On 22 December 1984, Haskell was working on his wife's car. He observed defendant fire two shots into the air. Haskell suggested that defendant's shooting could endanger the neighborhood children, but defendant responded that "everybody else is shooting" and "well, it's Christmas."

y General, by Steven F. Bryant, r the State foriginal brief and Attorney General, James J. Co- General, William N. Farrell, Jr., l, Joan H. Byers, Special Deputy ant, Assistant Attorney General, Attorney General, for the State ll).

ppellate Defender, by David W. fender, for defendant-appellant lcolm Ray Hunter, Jr., Appellate for defendant-appellant (supple-

t E. Zaytoun for North Carolina us curiae.

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de defendant outside of Wades- skell was working on his wife's two shots into the air. Haskell ing could endanger the neighbor- sponded that "everybody else is as."

Haskell telephoned the Anson County Sheriff's Department, and Deputy Calvin Lambert responded. After discussing the situation with Haskell, Lambert walked onto defendant's porch and attempted to talk with him. Lambert asked defendant to step out onto the porch, but defendant remained inside. Lambert told defendant not to shot his gun because he was drunk and might hurt someone. He then returned to his car and observed defendant's home for several minutes before leaving the area.

Later, Haskell saw defendant lying in front of his outhouse. Because defendant could not stand unaided, a neighbor helped him to his house. Defendant had locked himself out, and the neighbor helped him gain entry by prying open a window. A few minutes later defendant hailed Duke Cox, a neighborhood teenager, and asked Cox to help him fix the window. Cox attempted to help, but he soon left because defendant refused to provide a hammer. When Cox walked away, defendant accused him of stealing some money and fired three shots in his direction.

Prompted by this incident, Haskell again called the sheriff's department. Deputies Robert Usery and Kress Horne responded. They asked defendant to come outside; defendant responded by threatening to kill them if they did not leave. More officers arrived, and Usery decided to investigate in back of defendant's house while Horne stood behind the patrol car and continued to talk to defendant. While Usery circled behind defendant's house, Horne drew his revolver and braced himself across the patrol car. Defendant pushed open his screen door and fired one shot that hit Horne in the face. Horne later died from the resultant injuries.

The other officers surrounded the house, and Usery advised defendant that he would use tear gas if defendant did not come out. Hearing no response, Usery threw a tear gas canister into the house. After defendant fired two shots, the officers returned a short burst of fire. Defendant then walked out, and the officers took him into custody. Because defendant was bleeding from two wounds, the officers transported him to the Anson County Hospital.

There, Dr. Merceda Perry examined defendant. Perry found two bullet wounds, and he noticed a strong odor of alcohol. He treated a puncture wound on defendant's buttocks and a deep laceration on his forehead, which he closed with sutures. Initially,

Perry found that defendant responded incoherently to his questions. At approximately 6:30 p.m., Perry ordered a blood alcohol test which indicated that defendant's blood alcohol level was equivalent to a .26 reading on the breathalyzer scale. Although defendant remained intoxicated, he had become more coherent by 7:20 p.m., the last time Perry saw him. In Perry's opinion, defendant would have become more coherent still by 8:30 p.m. At 8:15 p.m., Perry released defendant into the custody of S.B.I. Agent Carl Jackson for delivery to Central Prison in Raleigh.

Jackson and two deputy sheriffs placed defendant in a van and drove him to the sheriff's department, where warrants were served on him. They then drove toward Raleigh. When defendant complained that he was thirsty, the officers purchased two soft drinks, which defendant consumed. Jackson read defendant his rights, and defendant orally agreed to waive them. Defendant refused to sign a written waiver because his head injury prevented him from seeing the waiver form. Defendant made several statements during the trip admitting that he killed Deputy Horne because Horne "pressured" him.

GUILT PHASE

[1] Defendant contends that the jury's verdict of guilt, and its conclusion that death is the appropriate punishment, are "fatally undermined" by the fact that both the trial court and the prosecutor informed the jury that the trial was subject to appellate review. The factual basis of the argument is as follows:

First, at the outset of the trial the court identified the court reporter to the jurors and explained:

> The lady right down here in front of me in the blue dress is Melody Courtney. She's a court reporter. She will be taking down everything that's said or done during the trial so that everything is a matter of public record and then she can type up a transcript of a trial and they mail it down to the Supreme Court and the Supreme Court can review what we're doing up here in Stanly County.

Defendant did not object to this statement, and the court continued its general explanation of the duties of various court personnel.

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Second, in his closing guilt-phase argument, the prosecutor stated the following:

> And you may say, well, what is our role? Now, the Judge will tell you what your role as a trial juror happens to be. As we understand your role, you are the finders of fact, simply that. You don't decide what the law is. You don't interpret the law. The law is given to you by the Judge and he tells you what the meaning of that law is, and he will tell you how you—he will tell you how to apply that law which he gives to you to the facts that you have found from the sworn testimony.
>
> The jury is simply a fact—a body that finds facts. That's all you're here for. There is no appeal in your finding of facts. There is a right of appeal to any interpretation of laws and application of laws which are present in this case. The defendant, if convicted, as we say he certainly should be from the evidence and under the law, he can appeal on points of law,—
>
> MR. STOKES: OBJECTION.
>
> MR. LOWDER: —questions of law,—
>
> THE COURT: OVERRULED.
>
> MR. LOWDER: —but he cannot appeal from your findings of fact.

The legal basis of defendant's argument is grounded, essentially, in this Court's decisions in *State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975), and *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979), and in the United States Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed. 2d 231 (1985). The pertinent aspects of these cases are as follows:

In *White*, the prosecutor argued:

> "[Y]ou will answer the question whether this defendant is guilty of first degree murder. If found guilty, he gets an automatic appeal to the Supreme Court of North Carolina—it is necessary. If any error is made in this court, that Court will say."

White, 286 N.C. at 402, 211 S.E. 2d at 449. The trial court sustained defendant's objection and instructed the jury: "[D]on't consider what he said about the Supreme Court." Later, as it began its charge, the court gave the following instruction:

> "I want to go back to the argument that was objected to in the argument of counsel that the Supreme Court has a right to send this case back on mistakes. The reason I sustained that objection, I want you all to understand is that the Supreme Court will review this case. That they would only send the case back if I make a mistake on a legal question. They will not review the decisions of the facts by the jury. The jury is the sole trier of the facts of this lawsuit."

Id. at 402-03, 211 S.E. 2d at 449. We explained that an argument suggesting that the jury can "depend upon either judicial or executive review to correct any errors in their verdict, and to share their responsibility for it, is an abuse of privilege and prejudicial to the defendant." *Id.* at 403, 211 S.E. 2d at 450. The prosecutor's argument, we said, "was clearly intended to overcome the jurors' natural reluctance to render a verdict of guilty of murder in the first degree by diluting their responsibility for its consequences." *Id.* at 404, 211 S.E. 2d at 450. While the court accurately stated that this Court will only review questions of law, the instructions were nonetheless held inadequate to cure the impropriety because they "did not fully enlighten the jury as to the nature of the Supreme Court's review of a case on appeal and as to the difference between 'triers of the facts' and judges of the law." *Id.* Moreover, we said, the jury probably understood the statement that "the Supreme Court will review this case" to mean that the trial court assumed that there would be a guilty verdict. *Id.* at 404, 211 S.E. 2d at 450-51. For these reasons, we granted the defendant a new trial. *Id.* at 404, 211 S.E. 2d at 451.

In *Jones*, the prosecutor argued: "[I]f you do err in this case he [defendant] has the right of appeal." *Jones*, 296 N.C. at 497, 251 S.E. 2d at 427. Because an appellate court will not review the factfinder's verdict in the guilt phase, we observed that the prosecutor had made an inaccurate statement. Moreover, the argument's "overriding vice" was that it "effectively told the jurors that they could rely upon the Supreme Court to correct their verdict if it were wrongful or improper . . . ." *Id.* at 500, 251 S.E. 2d

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at 428. We held that the argument could have caused the jury to believe that this Court would share its burden of reaching a verdict, and we thus granted defendant's request for a new trial. *Id.*

In *Caldwell*, the prosecutor argued to the jury: "[Y]our decision is not the final decision. . . . Your job is reviewable." *Caldwell*, 472 U.S. at 325, 86 L.Ed. 2d at 237. In addition, the trial court stated that the jury's decision would be "reviewable automatically as the death penalty commands." *Id.* The United States Supreme Court vacated defendant's death sentence, stating that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 86 L.Ed. 2d at 239.

These cases stand for the proposition that statements by the trial court or prosecutor that tend to dilute the jury's sense of responsibility for its determinations by suggesting that its verdict will be reviewed, or that the punishment imposed will be withheld, are impermissible and prejudicial. *See* 75 Am. Jur. 2d *Trial* § 230 (1974) ("[c]omments . . . on the power of the court to suspend sentence or to set the jury's verdict aside, or statements that a higher court has the power to review the finding of the jury on the weight of the evidence, are calculated to induce the jury to disregard their responsibility, and are improper."). That proposition is not implicated, however, by the facts here, which are distinguishable from those in the above cases.

In *White*, the prosecutor told the jury that "[if] any error is made *in this court*, [the Supreme] Court will say." *White*, 296 N.C. at 402, 211 S.E. 2d at 449 (emphasis added). The jury clearly could have interpreted the phrase "in this court" to include its errors as well as the court's errors. Here, by contrast, the prosecutor clearly stated that defendant could not appeal from the jury's findings of fact.

Further, in *White* the court stated to the jury that "the Supreme Court *will* review this case." *Id.* at 402, 211 S.E. 2d at 449 (emphasis added). This Court concluded that by that "positive statement . . . the jury was bound to have understood that the court assumed [that] their verdict would be guilty." *Id.* at 404, 211 S.E. 2d at 450-51. Here, by contrast, the court only noted the possibility of appeal by stating—in the context of a routine explanation of the court reporter's duties—that "the Supreme Court can review" this case. (Emphasis added.) This statement implies no assumption of guilt and only conveys information commonly known. We conclude that this brief comment—at the outset of the trial and in the context of an explanation of the court reporter's duties—could not have influenced, adversely to defendant, the jury's perception of its responsibility for its decisions.

Likewise, in *Jones*, the prosecutor argued to the jury: "[I]f you do err in this case he [defendant] has the right of appeal." *Jones*, 296 N.C. at 497, 251 S.E. 2d at 427 (emphasis added). Here, as noted above, the prosecutor instead clearly stated that defendant could not appeal from the jury's findings of fact. The challenged argument was simply an explanation of the jury's function and of the application of the law to the facts.

Finally, in *Caldwell* the prosecutor argued to the jury: "[Y]our decision is not the final decision. . . . Your job is reviewable. . . . [T]he decision you render is automatically reviewable by the Supreme Court." *Caldwell*, 472 U.S. at 325-26, 86 L.Ed. 2d at 237. As noted above, the United States Supreme Court vacated the death sentence on the ground that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29, 86 L.Ed. 2d at 239. It stated: "[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333, 86 L.Ed. 2d at 242.

Again, unlike in *Caldwell*, the prosecutor here did not argue that the jury's determination of defendant's guilt and punishment was not final. Instead, he clearly informed the jury that there was no appeal from its findings of fact. The risk condemned in *Caldwell*, *viz*, "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court," *id.* at 330, 86 L.Ed. 2d at 240, thus is not present here.

For the foregoing reasons, we do not find *White*, *Jones*, and *Caldwell* controlling. Instead, we conclude that this case is more

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like *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977). The trial court in *Finch* remarked: "[T]ake what the court says about the law, and what it is in the case. *If the Court is wrong, then the Court of Appeals will let that be known. Somebody will straighten that out, but you take your instructions from the Court.*" *Id.* at 135, 235 S.E. 2d at 821 (emphasis in original). We held that these statements did not suggest that the verdict would be reviewed or that the mandated punishment would be withheld; they simply informed the jury that the law, as stated by the trial court, could be reviewed. *Id.* at 137, 235 S.E. 2d at 822.

Here, as in *Finch*, nothing in the statements by the court or the prosecutor could reasonably be construed to diminish the jury's responsibility for its decisions. The trial court only informed the jury that this Court "can review" the case. (Emphasis added.) "Mere reference to the process of appellate review does not invalidate a death sentence." *Mazzan v. State*, 733 P. 2d 850, 851 (Nev. 1987). Viewed in context, the prosecutor's argument stressed the jury's role as the final factfinder rather than diluting its sense of responsibility for its verdict. *See id.* at 851 ("argument did not shift responsibility to the appellate court, but rather heightened the sentencing jury's awareness of the gravity of its task"); *Riley v. State*, 496 A. 2d 997, 1025 (Del. 1985), *cert. denied*, 478 U.S. 1022, 92 L.Ed. 2d 743 (1986) ("In no sense may it reasonably be said that the prosecutor was either misstating the law, misleading the jury as to its role, or minimizing its sentencing responsibility."). We thus conclude that the trial court did not abuse its discretion by allowing the argument. *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E. 2d 110, 122 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985). These assignments of error are overruled.

[2] Defendant next contends that the trial court erred by allowing the prosecutor, during voir dire, to "stake out" the jurors by obtaining commitments from them to disregard defendant's intoxication in determining the existence of premeditation and deliberation and to reject his voluntary intoxication defense. Defendant failed to object to the prosecutor's questions at trial. Ordinarily, such failure constitutes a waiver of the right to assert the alleged error on appeal. *State v. Oliver*, 309 N.C. 326, 334, 307 S.E. 2d 304, 311 (1983). However, in light of our practice of scrupulous review in death sentence cases "to the end [that] it

may affirmatively appear that all proper safeguards" have been afforded the defendant, *State v. Whitley*, 288 N.C. 106, 108, 215 S.E. 2d 568, 570 (1975) (quoting *State v. Fowler*, 270 N.C. 468, 469, 155 S.E. 2d 83, 84 (1967)), we elect to review the issue.

The prosecutor asked several prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. The questions varied slightly, but the thrust of each was:

> If it is shown to you from the evidence and beyond a reasonable doubt that defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to [a]ffect your verdict?

Each juror responded negatively to the question.

Counsel is allowed wide latitude in examining jurors on voir dire; regulation of the form of the questions lies within the trial court's discretion. *State v. Vinson*, 287 N.C. 326, 336, 215 S.E. 2d 60, 68 (1975), *modified as to death penalty*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976). A defendant seeking to establish reversible error must demonstrate prejudice as well as a clear abuse of that discretion. *State v. Avery*, 315 N.C. 1, 20, 337 S.E. 2d 786, 797 (1985).

In *Vinson*, we explained:

> [H]ypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. . . . The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.
>
> Types of questions which have been considered improper include "those asking a juror what his verdict would be if the evidence were evenly balanced; if he had a reasonable doubt of a defendant's guilt; if he were convinced beyond a reasonable doubt of a defendant's guilt; or questions asking him

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whether he would, in a specified hypothetical situation, vote in favor of the death penalty. . . ."

Vinson, 287 N.C. at 336-37, 215 S.E. 2d at 66 (citations omitted); *accord State v. Avery*, 315 N.C. at 20, 337 S.E. 2d at 797.

The questions here were properly allowed as an inquiry into the jurors' sympathies toward an intoxicated person. They did not contain incorrect or inadequate statements of law, nor were they ambiguous or confusing. Moreover, they did not tend to "stake out" the jurors as to their potential verdict or how they would vote under a given state of facts. The questions did not "fish for answers to legal questions before the judge ha[d] instructed the jury." *State v. Clark*, 319 N.C. 215, 221, 353 S.E. 2d 205, 208 (1987).

Addressing the propriety of similar questions, our Court of Appeals has upheld the State's questioning prospective jurors as to whether they could be fair and impartial in a case involving a proposed sale of marijuana. *State v. Williams*, 41 N.C. App. 287, 254 S.E. 2d 649, *disc. rev. denied*, 297 N.C. 699, 259 S.E. 2d 297 (1979). It held that the State's questions tended only to "secure impartial jurors," while not causing them to commit to a future course of action. *Id.* at 291-92, 254 S.E. 2d at 653.

As in *Williams*, the prosecutor here was simply inquiring into the sympathies of prospective jurors in the exercise of his right to secure an unbiased jury. *See State v. Lee*, 292 N.C. 617, 621, 234 S.E. 2d 574, 577 (1977) (State entitled to unbiased jury; primary purpose of voir dire is to secure such). A promise not to sympathize with a defendant because of his intoxication is not the equivalent of a commitment to ignore the effect of intoxication in the resolution of legal issues. The questions and responses did not "stake out" the jurors to disregard the trial court's instructions on the effect of intoxication in determining defendant's guilt or innocence, or his sentence, under the law applicable to the facts presented. We thus hold that the trial court did not abuse its discretion by failing *ex mero motu* to prohibit this line of questioning. *See State v. Clark*, 319 N.C. 215, 353 S.E. 2d 205 (proper for prosecutor to ask prospective jurors if the fact that the State was relying on circumstantial evidence would cause them any problems); *State v. Hedgepeth*, 66 N.C. App. 290, 310 S.E. 2d 920 (1984) (proper for defense counsel to ask prospective jurors if they

could follow instructions to consider defendant's criminal record only in determining his credibility).

Defendant next assigns error to the trial court's refusal to suppress evidence of his inculpatory post-arrest statements. He argues that he did not make a voluntary waiver of his *Miranda* rights and did not make his statements voluntarily.

After a voir dire hearing to determine the admissibility of defendant's statements, the trial court made findings of fact and conclusions of law, in pertinent part, as follows:

> [T]hat the defendant was arrested at the scene of the crime . . . [at] approximately six o'clock p.m. on December the 22nd, 1984; that he was charged with assault with a deadly weapon with intent to kill, three counts; that he was thereafter taken to the Anson County Hospital and treated for a wound to his head and to his buttocks; and that he was thereafter taken by van to . . . Central Prison for safekeeping; . . . that he was interrogated in the van enroute . . .; that the temperature and conditions inside the van were comfortable; . . .; that prior to any question or interrogation the defendant was advised of his constitutional rights . . .; that these rights were read to him; that he was advised of his rights at approximately 8:45 p.m., advised of his right to remain silent and [that] anything he said would be used against him as evidence in court, and advised of [his] right to have an attorney present before and during any questioning; that he was advised of a right to have an attorney appointed, if he couldn't afford one, the State . . . would appoint him one; that he was advised of his right to . . . stop answering questions at any time and not to resume until he had an attorney present if he wanted one; that he was advised of these rights by Special Agent Carl Jackson . . . of the [S.B.I.]; . . . that [Jackson] . . . was introduced as a law enforcement officer; and that he was also advised of his rights in the presence of Henry Watkins . . . and George Pratt . . . [;] . . . that the defendant replied orally in English that he understood all of this stuff, that he had been tried for his life in 1951, and that he had heard all of this stuff before, and that he understood his rights; that he stated that he did not want a lawyer present and that he stated that he would talk, but that he didn't

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want to sign anything because he could not see[;] . . . that he was interrogated in English by [Jackson] and at a later point questions were asked by [Watkins] and Pratt[;] . . . that the defendant is approximately sixty-five years old and he speaks and understands English[;] . . . that his educational background is very limited, that he has an I.Q. of approximately—between 74 and 98[;] . . . that his physical condition at the time of the interrogation was that he had been released from the hospital, that he had been treated for an injury to his eye; that his left eye was swollen shut; that he was blind in his right eye; that he had an injury to his hip from a gunshot wound; that both of these wounds had been treated by a physician at the Anson County Hospital; that he was in good condition otherwise; that he was sitting up and that other than the bandage he appeared basically [in] the same condition as he does in court today; that at one point . . . the defendant requested something to drink and . . . was provided with two soft drinks, which he consumed[;] . . . that the defendant had a slight to moderate odor of alcohol about his person and that at the time of the interrogation at 9:43 and thereafter that he was not under the influence of alcohol or drugs[;] . . . that the defendant was coherent, that he was understanding and that he was not confused and not complaining[;] . . . that the answers in relation to the questions asked were extremely reasonable, responsive and appropriate[;] . . . that no promises, offers of reward or inducement[s] by any law enforcement officers were made in order for the defendant to make a statement[;] . . . that there were no threats or suggest[ions] of violence or show of violence by any law enforcement officers made to persuade or induce the defendant to make a statement[;] . . . that the defendant made no statement desiring to stop the questions, but at one point he did request to be allowed to rest, and that he was allowed to rest for approximately seventeen minutes[;] . . . that the defendant made no request for an attorney during any of the questioning, and that the defendant expressly stated he did not want an attorney present; that the defendant . . . expressly stated that he did understand his rights; that he was unable to sign the written waiver, but that he did, in fact, make an expressed oral waiver to [Jackson]. And based on these findings of fact the Court would conclude as a

matter of law that under the totality of the circumstances none of the constitutional rights, neither Federal nor State, of the defendant were violated by his arrest, detention, interrogation, or confession; that there were no promises, offers of reward, or inducement[s] to the defendant to make a statement; that there were no threat[s] or suggest[ions] of violence or show of violence to persuade or induce the defendant to make a statement; that the statements made by the defendant to [Jackson] . . . were made freely, voluntarily and understandingly; that the defendant was in full understanding of his constitutional rights to remain silent, of his right to counsel, and all other rights; and that he freely, knowingly, intelligently and voluntarily waived each of those rights and thereupon made the statement to the officers above mentioned.

The court then overruled defendant's objection to admission of the statements.

Defendant contends that the above findings are not supported by the evidence. At a voir dire hearing on the admissibility of a confession, the trial court must determine whether the State has met its burden of showing by a preponderance of the evidence that the confession was voluntary. *State v. Corley*, 310 N.C. 40, 52, 311 S.E. 2d 540, 547 (1984). However, appellate courts do not apply the preponderance of the evidence test. *Id.* Rather, the findings are conclusive on appeal if they are supported by competent evidence in the record. *Id.; State v. Perdue*, 320 N.C. 51, 58, 357 S.E. 2d 345, 350 (1987). Despite conflicting evidence, "[n]o reviewing court may properly set aside or modify these findings if so supported." *State v. Jackson*, 308 N.C. 549, 569, 304 S.E. 2d 134, 145 (1983). However, the conclusions of law are fully reviewable. *State v. Perdue*, 320 N.C. at 58, 357 S.E. 2d at 350.

At the voir dire hearing, the trial court heard testimony from Dr. Mercedes Perry, S.B.I. Agent Carl Jackson, and Dr. Robert Rollins. Perry, a doctor at the Anson County Hospital, testified that:

Defendant arrived at the Anson County Hospital at around 6:30 p.m. Perry examined defendant and found that he had suffered a laceration to his forehead and a puncture wound to his buttocks. While these injuries are normally painful, defendant ex-

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pressed only discomfort. Defendant appeared intoxicated, and he had difficulty answering questions coherently. Defendant did not receive any narcotic medication, and he was not hallucinating. A little after 6:30 p.m., defendant underwent a blood alcohol test which indicated a blood alcohol level equivalent to a .26 reading on the breathalyzer scale. To accelerate defendant's recovery from his intoxication, Perry administered intravenous fluids, dextrose and water. After defendant received these fluids, his mental and physical condition improved considerably; he became more coherent and cooperative. When Perry last saw defendant, around 7:20 or 7:25 p.m., defendant had become far more lucid than he was when Perry arrived. In Perry's opinion, defendant's condition would have continued to improve over the next hour. Perry released defendant from the hospital so that he could be transported to Raleigh.

S.B.I. Agent Jackson testified that:

Jackson and two deputy sheriffs picked up defendant at the Anson County Hospital. The officers first drove their van to the Anson County Sheriff's Department where defendant was served with three warrants for assault with a deadly weapon with intent to kill. The officers then drove toward Raleigh to deliver defendant to Central Prison. Jackson advised defendant of his constitutional rights by reading from the S.B.I. interrogation form. In response, defendant stated: "I was tried for my life, and I understand all this stuff." At 9:43 p.m., Jackson read defendant an explicit waiver of rights. Defendant stated that he understood the waiver and that he would talk to the officers; however, he did not want to sign the waiver because he could not see it. After agreeing to waive his rights, defendant complained that he was thirsty, and the officers purchased two soft drinks, which defendant consumed.

Jackson made sure defendant knew he was talking with law enforcement officers. Jackson also informed defendant that they were transporting him to Central Prison for safekeeping. Jackson then began questioning defendant about the day's events. Defendant made incriminating statements that Jackson later recounted in his testimony to the jury. At 10:20 p.m., defendant wanted a break because he was tired, and Jackson stopped questioning him.

At 10:37 p.m., Jackson tapped defendant on the shoulder and asked if he was asleep. Defendant indicated that he was not sleep-

ing and that he was cold; the officers covered him with a sheet and turned up the heat. Jackson asked defendant to continue his story, but defendant became annoyed with Jackson. The other officers asked defendant if he would answer their questions, and defendant agreed. Defendant proceeded to make further incriminating statements that Jackson related to the jury. In particular, defendant explained that he shot Deputy Horne because "he pressured me the wrong way." An officer asked defendant if he was fearing for his life, and defendant replied: "I'm fearing for my life right now." After the officers assured defendant that he was in no danger, the discussion continued. At 10:55 p.m., defendant remarked that he was tired and his hip was beginning to hurt. The officers then terminated the interview.

During the interview defendant appeared rational, and his statements made sense. Defendant was able to sit upright in the van by himself. Defendant did complain about stiffness in his hip. He appeared sober despite a slight to moderate odor of alcohol about his person.

Defendant is blind in his right eye, and his left eye was swollen shut because of the injury to his forehead. When defendant complained of being cold, the officers turned up the heat and maintained a comfortable temperature in the van. Jackson did not offer defendant any reward in return for a statement. Jackson did not coerce or pressure him to make a statement. Defendant never asked for an attorney. Jackson knew that defendant had been convicted of first degree murder in 1951 and felonious assault with intent to kill in 1977.

Robert Rollins, a forensic psychiatrist, testified that:

Defendant suffers from mixed personality disorder including features of paranoid thinking, impaired abstract thinking, impaired judgment and impaired perception. He also suffers from organic delusional syndrome, manifested by false beliefs. Generally antisocial, defendant tends to overreact violently to perceived threats. Defendant engages in episodic alcohol abuse, but, according to defendant's supervisor, he was a good worker who did not drink on the job. When defendant was admitted to Dorothea Dix Hospital in February 1985, he achieved an I.Q. test score of seventy-four, which places him in the "borderline range of in-

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Based on Dr. Perry's description of defendant's condition and treatment on the night of the shooting, Rollins believed that defendant's intoxicated condition would have improved over time. Nonetheless, defendant would have been substantially intoxicated when the interrogation took place, and this intoxication would have exacerbated defendant's mental disabilities. Because of his mental disorders, defendant would not have been capable of voluntarily waiving his rights at the time of the interview.

The above *voir* dire testimony establishes that the pertinent findings are supported by competent evidence. They thus are binding on this Court. *State v. Perdue*, 320 N.C. at 59, 357 S.E. 2d at 350.

[3] In addition to a general challenge to the findings, defendant specifically disputes the finding that he made an express waiver of his rights. He contends that, rather than merely declining to sign a waiver he could not see, he in fact refused to waive his rights. Agent Jackson explicitly testified, however, that defendant stated that he understood his rights and agreed to talk with the officers. This evidence supports the trial court's finding.

[4] Defendant also specifically challenges the finding that he never expressed a desire to terminate the interview; he contends that he invoked his rights by asking the officers to terminate the questioning at 10:20 p.m. Jackson expressly testified, however, that defendant wanted to take a break because he was tired, and that he subsequently agreed to resume the conversation. Thus, the finding is again supported by the evidence.

Defendant further contends that the findings do not support the conclusions that he made a voluntary confession and waiver of his *Miranda* rights. While the findings, if supported by evidence, are binding upon this Court, the conclusions of law are fully reviewable. *Id.* The legal significance of the findings is a question of law for this Court. *State v. Jackson*, 308 N.C. at 582, 304 S.E. 2d at 152.

[5] In determining the voluntariness of the confession and the waiver of *Miranda* rights, we look to the totality of the circumstances. *Id.* at 581, 304 S.E. 2d at 152. However, police coercion is a necessary predicate to a determination that a waiver or statement was not given voluntarily within the meaning of the Due Process Clause of the Fourteenth Amendment. *Colorado v. Connelly*, 479 U.S. ---, 93 L.Ed. 2d 473 (1986). Because the purported waiver and the statement arose within the same set of circumstances, we discuss the voluntariness of the confession as a single issue. *Cf. State v. Corley*, 310 N.C. at 48, 311 S.E. 2d at 545 (despite compliance with *Miranda*, ultimate question determining admissibility of confession is whether it in fact was made voluntarily).

[6] Defendant previously had been convicted of two felonies. He told Agent Jackson that because of this experience, he understood "all this stuff" (i.e., his rights). Prior experience with the criminal justice system "is an important consideration in determining whether an inculpatory statement was made voluntarily and understandingly." *State v. Fincher*, 309 N.C. 1, 20, 305 S.E. 2d 685, 697 (1983) (defendant's one prior arrest considered significant in determining voluntariness of confession); *see also State v. Jackson*, 308 N.C. at 582, 304 S.E. 2d at 153. This circumstance thus supports the conclusions that the waiver and the confession were voluntary.

[7] While intoxication is a circumstance critical to the issue of voluntariness, intoxication at the time of a confession does not necessarily render it involuntary. *State v. Perdue*, 320 N.C. at 59-60, 357 S.E. 2d at 350-51. It is simply a factor to be considered in determining voluntariness. *See* Annot. "Sufficiency of Showing that Voluntariness of Confession or Admission was Affected by Alcohol or Other Drugs," 25 A.L.R. 4th 419 (1983 and Supp. 1987). The confession "is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E. 2d 200, 205 (1981).

At about 6:30 p.m. defendant had a blood alcohol level equivalent to a .26 reading on the breathalyzer scale, and he appeared intoxicated. Dr. Perry administered fluids to defendant to accelerate his recovery from his intoxication. During the next hour, Perry observed considerable improvement in defendant's mental and physical condition. Both Perry and Rollins agreed that defendant's condition would have continued to improve over time. The officers did not begin questioning defendant until some two

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hours after the blood alcohol test. Agent Jackson explicitly testified that defendant appeared to be sober during the interview. Jackson also stated that defendant spoke rationally and coherently. The trial court specifically found that defendant was not under the influence of alcohol during the interview. There was ample evidence to support this finding. *See State v. McClure*, 280 N.C. 288, 291, 185 S.E. 2d 693, 695 (1972). Therefore, the fact that defendant may have experienced some lingering, mild intoxication at the time of the confession did not preclude the conclusion that he confessed voluntarily. *State v. Perdue*, 320 N.C. at 59-60, 357 S.E. 2d at 350-51; *see also Bryant v. State*, 16 Ark. App. 45, 696 S.W. 2d 773 (1985) (less than an hour after defendant signed a waiver of his *Miranda* rights, he had a blood alcohol level of .28; waiver held voluntary). Rather, defendant's intoxication was relevant to his credibility, which was a question for the jury. *State v. McClure*, 280 N.C. at 290-91, 185 S.E. 2d at 695 (citing *State v. Logner*, 266 N.C. 238, 145 S.E. 2d 867, *cert. denied*, 384 U.S. 1013, 16 L.Ed. 2d 1032 (1966)).

[8] While important, subnormal mentality—standing alone—will not render a confession inadmissible. *State v. Taylor*, 290 N.C. 220, 231, 226 S.E. 2d 23, 29 (1976) (citing *State v. Thompson*, 287 N.C. 303, 318, 214 S.E. 2d 742, 752 (1975), *modified as to death penalty*, 428 U.S. 908, 49 L.Ed. 2d 1212 (1976)). If a person has the mental capacity to testify and to understand the meaning of his statements, he has sufficient mental capacity to make a voluntary confession. *Id.*

Rollins testified that defendant's I.Q. placed him in the borderline range of intellectual functioning; however, there was no testimony that defendant did not have sufficient intelligence to understand the meaning of his words. Moreover, Perry reported that after defendant received fluids he responded coherently to questions. Defendant spoke rationally during his extensive conversation with the officers. He held a job prior to the shooting, and his supervisor described him as a good worker. He also had sufficient mental capacity to testify at trial. The evidence thus permitted a conclusion that defendant had sufficient mental capacity to waive his rights and voluntarily confess.

[9] Rollins testified that defendant's mental disorders would prevent him from making a truly voluntary confession. However,

Jackson had ample opportunity to observe defendant at the time the waiver and statements were made, and he gave substantial testimony indicating that defendant was able to comprehend the discussion. When a non-expert has had a reasonable opportunity to observe a defendant and to form an opinion based on such observation, he may testify as to his opinion of the defendant's mental condition. *State v. Taylor*, 290 N.C. at 232, 226 S.E. 2d at 30. The evidence thus did not preclude a conclusion that defendant's mental disorders did not prevent his making a voluntary confession.

The evidence did not indicate that defendant's blindness or injuries at the time of his confession had any bearing on the voluntariness of his waiver and statement. They were not shown to have precluded understanding or a free exercise of the will. *Cf. State v. White*, 291 N.C. 116, 123, 229 S.E. 2d 152, 155 (1976) ("Illiteracy does not preclude understanding or a free exercise of the will.").

Finally, we note the absence of circumstances that we have often emphasized in our consideration of voluntariness:

> [Defendant] was not deceived or tricked about the nature of the crime involved or the possible punishment. . . . He was not subjected to prolonged uninterrupted interrogation. He was not subjected to physical threats or shows of violence. No promises were made to him in return for his confession.

State v. Jackson, 308 N.C. at 582, 304 S.E. 2d at 152-53 (citations omitted). The absence of these circumstances supports the conclusion that the waiver and statements were made voluntarily. *See Colorado v. Connelly*, 479 U.S. ---, 93 L.Ed. 2d 473.

[10] For the foregoing reasons, after a thorough review of the record we conclude that the totality of the circumstances permitted the trial court's conclusion that defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights and that his statements were made freely, understandingly, and voluntarily. We thus find no error in the denial of defendant's motion to suppress these statements.

[11] Defendant next challenges the overruling of his objection to the prosecutor's argument concerning the expert testimony of defendant's psychiatrists. The prosecutor argued:

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es the overruling of his objection to ncerning the expert testimony of de- rosecutor argued:

> Well, I want to tell you this about psychiatric testimony. If they were the so-called experts of all times and if the law recognized them as the expert[s] on what the condition of somebody's mind was, you wouldn't be hearing the case.
>
> MR. STOKES: OBJECT.
>
> THE COURT: OVERRULED. Go ahead
>
> MR. LOWDER: The law says that you may hear from the so-called expert witnesses, yes, and you can consider that, but it also says that you may take into account what other people have said about him. We've had other witnesses that told you about him. We had his neighbor right across the street to tell you how he was acting on this day.

Defendant contends that under N.C.G.S. § 8C-1, Rule 702, the law does recognize an expert forensic psychiatrist, qualified and accepted by the court, as an expert witness on "what the condition of somebody's mind was." He asserts that the prosecutor deliberately misstated the law in order to mislead the jury.

It is well-established in this jurisdiction that "[t]estimony regarding mental capacity is not confined to expert witnesses alone." *State v. Evangelista*, 319 N.C. 152, 162, 353 S.E. 2d 375, 382-83 (1987). "Anyone who has had a reasonable opportunity to form an opinion is permitted to give his opinion upon the issue of mental capacity." *Id.* at 162, 353 S.E. 2d at 383; *see also State v. Davis*, 321 N.C. 52, 55-56, 361 S.E. 2d 724, 726-27 (1987). The evidence here included both expert and non-expert opinion testimony on defendant's sanity at the time of the shooting. The argument in question was an exhortation to the jury to consider both kinds of testimony in resolving this question.

In isolation, the statement "if the law recognized them [psychiatrists] as the expert[s] on what the condition of somebody's mind was, you wouldn't be hearing the case" could be misleading. However, the prosecutor went on to state correctly that the law permits hearing from the experts and considering what they have to say. He then urged the jurors to consider not only the expert testimony but also that of the other witnesses. "Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is

extreme and is clearly calculated to prejudice the jury." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E. 2d 110, 122 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985). Viewed in context, the potentially misleading portion of the prosecutor's argument was not so "extreme and . . . clearly calculated to prejudice the jury" as to warrant a holding that the trial court abused its discretion in overruling defendant's objection.

[12] Defendant next assigns error to the prosecutor's argument suggesting that the fact that defendant was competent to stand trial indicated that his insanity defense lacked merit. Defendant contends that this argument tended to confuse the jury by blending the issues of competency to stand trial and insanity.

Although potentially misleading, the argument did not misstate the law. It simply urged the jury to consider evidence of defendant's state of mind at the time of trial in passing upon his state of mind at the time of the shooting. The trial court gave clear and correct instructions on insanity. *See State v. Evangelista*, 319 N.C. at 181, 353 S.E. 2d at 382. In light of the foregoing, we decline to find an abuse of discretion in the failure to sustain defendant's objection to the argument.

[13] Defendant next contends that the trial court erred by sustaining the State's objection to a portion of his closing argument. Dr. Rollins had testified that defendant was legally insane at the time of the shooting and that he lacked the mental capacity to premeditate and deliberate the act. Addressing the relevance of Dr. Rollins' testimony, defense counsel argued:

> And he said too that at that time, on that evening, December the 22nd, 1984, that he could not premeditatedly [sic] or deliberate to shooting the deputy. That's what he said. How is that significant? His Honor—I believe he will charge you that in order for you to find the defendant guilty of first degree murder, that before you can do that, you've first got to be satisfied beyond a reasonable doubt [that] certain elements of the crime are met. Among those, one of the elements of first degree murder is that there was premeditation and deliberation, unlawful killing of a human being with premeditation and deliberation. Premeditation and deliberation. That thought went into it. That there was time to think, to reflect, to choose to do the thing.

...sulated to prejudice the jury." *State v.* ...111, 322 S.E. 2d 110, 122 (1984), *cert.* ...Ed. 2d 189 (1985). Viewed in context, ... portion of the prosecutor's argument ... clearly calculated to prejudice the ...ing that the trial court abused its dis...dant's objection.

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N.C.] IN THE SUPREME COURT 27

State v. McKoy

Dr. Rollins with all of his years of experience and with all of the work that went into his examination of Dock McCoy says he could not premeditate and deliberate at that time.

You've got to find before you can convict this man of first degree murder not only could he but that he did, so, in effect, what you've got to find is that not only was Dr. Rollins wrong about it, but that he was wrong about it beyond a reasonable doubt.

The following then occurred:

MR. LOWDER: We OBJECT to that.

MR. STOKES: That's a fair comment.

MR. LOWDER: We ask the Judge to rule on that objection.

. . .

THE COURT: I'll have to SUSTAIN that OBJECTION.

Defendant contends that his argument properly stated the proposition that the State bore the burden of proving beyond a reasonable doubt the premeditation and deliberation element of first degree murder. The State asserts that the argument implied that the State bore the burden of disproving the insanity defense, which is an inaccurate statement of our law. *State v. Mize*, 315 N.C. 285, 293-94, 337 S.E. 2d 562, 567 (1985). We conclude that the argument is reasonably subject to either of these interpretations. Although counsel should be allowed wide latitude in arguing to the jury, the control of the exercise of this privilege ordinarily lies in the sound discretion of the trial court. *State v. Robbins*, 319 N.C. 465, 505, 356 S.E. 2d 279, 303, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1987). Because the jury could have interpreted defendant's argument to misstate the law as applied to the facts, we find no abuse of discretion in the sustaining of the objection.

Further, the charge correctly and unambiguously emphasized the State's burden of proving premeditation and deliberation beyond a reasonable doubt. *See State v. Mize*, 315 N.C. at 293, 337 S.E. 2d at 567. In light of this, and in view of the record as a whole, we do not believe there is a reasonable possibility that the jury would have reached a different result if the court had overruled the objection. Thus, assuming error, *arguendo*, defendant has not carried his burden of showing prejudice. N.C.G.S. § 15A-1443(a) (1983).

We conclude that the guilt phase of defendant's trial was fair and free of prejudicial error.

SENTENCING PHASE

[14] Defendant contends that he is entitled to a new sentencing hearing because the jury failed to find the statutory mitigating circumstance that "the defendant was under the influence of mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2) (1983). Defendant presented two psychiatrists who testified that he was suffering from significant psychological disorders at the time of the shooting. He argues that there thus was uncontradicted and inherently credible evidence to support the existence of this mitigating circumstance, and that the jury's refusal to find this circumstance makes the sentencing determination unreliable in violation of the Eighth and Fourteenth Amendments.

We conclude that other evidence regarding defendant's mental and emotional state at the time of the shooting conflicted with that presented by defendant's experts. Prior to the shooting, defendant had held the same job for four years, and his supervisor described him as a good employee. On the day of the shooting, defendant was able to aim and fire his shotgun. When confronted by Haskell, defendant was able to explain that he was firing his shotgun into the air because "it's Christmas." At several points prior to the shooting, defendant conversed with the officers. After receiving medical treatment for his gunshot wounds, defendant was able to answer Dr. Perry's questions coherently. During the ride to Raleigh, defendant "appeared to be rational in all respects." Defendant gave a detailed narration of the day's events, and he explained that the reason he shot Horne was because Horne "pressured" him. Agent Jackson testified that defendant responded logically, and with clarity of recollection and expression, to questions posed by the officers. Defendant's own witness, Dr. Lara, testified that he found no evidence that defendant suffered from hallucinations, delusions, or "an ongoing psychosis."

We also reject defendant's assertion that the testimony of his psychiatric experts was inherently credible. Defendant's mental

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herently credible. Defendant's mental

and emotional state *at the time of the crime* is the central question presented by the submission of the mitigating circumstance in question; however, neither of defendant's experts examined him until several weeks or months after the crime. *See State v. Smith*, 305 N.C. 691, 705-06, 292 S.E. 2d 264, 273-74, *cert. denied*, 459 U.S. 1058, 74 L.Ed. 2d 622 (1982) (State's evidence concerning defendant's mental capacity conflicted with defendant's expert's after-the-fact opinions: "jury's duty to decide what to believe"). The jury was not required to believe defendant's evidence simply because the State did not specifically refute the testimony of defendant's experts. "Determining the credibility of evidence is at the heart of the fact-finding function." *State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 456 (1983).

Because the evidence concerning defendant's mental and emotional state was neither uncontradicted nor inherently credible, we find no merit in this argument. *See State v. Smith*, 305 N.C. at 706, 292 S.E. 2d at 274 ("all of the evidence" did not support the existence of a mitigating circumstance; defendant thus not entitled to peremptory instruction thereon).

[18] Defendant next contends that his rights under the Eighth and Fourteenth Amendments were violated by the trial court's allowing the District Attorney, in closing argument, to remind the jurors of their commitments not to have sympathy for defendant because he was intoxicated. The argument was as follows:

> Number seven, [defendant's] ability to remember the events of December the 22nd, 1984, is actually impaired, they contend. And that's the last one. I don't know. He was drinking liquor and I told you before you were chosen as a juror that if it is shown that he's intoxicated, were you going to have sympathy, sympathetic to his cause. As I recall, you said you wouldn't. I don't know. He can remember what he did because he told the officers about it.

Defendant did not object to this argument at trial. We thus can find an abuse of discretion in the trial court's failure to intervene *ex mero motu only* if impropriety in the argument was "gross indeed." *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E. 2d 752, 761 (1979). We find no gross impropriety. We have held above that the trial court did not abuse its discretion by failing *ex mero motu* to prohibit voir dire questions to prospective jurors regard-

ing their sympathies toward an intoxicated person. We likewise find no abuse of discretion in the trial court's allowing the District Attorney—in closing argument, without objection—to gently remind the jurors of their responses to these questions.

[19] Defendant next contends that the trial court's sentencing instructions were erroneous and unconstitutional because they required jury unanimity on the existence of a mitigating circumstance before that circumstance could be considered for the purpose of sentencing. We find no error.

We resolved this issue contrary to defendant's position in *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983), *overruled on other grounds*, *State v. Shank*, 322 N.C. 243, 367 S.E. 2d 639 (1968). In *Kirkley*, the trial court instructed the jury that "the defendant has the burden of persuading the jury as to the existence of any mitigating circumstance and if all twelve jurors are unable to agree that a specific mitigating circumstance exists they must find that it does not exist." *Kirkley*, 308 N.C. at 217-18, 302 S.E. 2d at 156. Therefore, the jury could only find a mitigating circumstance if it unanimously agreed that it existed. The defendant argued that the court should have instructed that the jurors could only determine that a mitigating circumstance did not exist if they unanimously found that it did not exist. *Id.* at 218, 302 S.E. 2d at 157.

We held that in a capital case "the jury must unanimously find that an aggravating circumstance exists before that circumstance may be considered by the jury in determining its sentence recommendation" and that "consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." *Id.* We stated:

> The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances. The unanimity requirement is only placed upon the finding of whether an aggravating or mitigating circumstance exists. With the exceptions of who has the burden of proof and the different quantum of proof required to establish the existence of a circumstance, we see no reason to distinguish the method a jury must use in finding the existence or nonexistence of aggravating and mitigating circumstances during

an intoxicated person. We likewise in the trial court's allowing the argument, without objection—to eir responses to these questions.

that the trial court's sentencing in- nd unconstitutional because they the existence of a mitigating cir- stance could be considered for the d no error.

ontrary to defendant's position in , 302 S.E. 2d 144 (1983), *overruled onk*, 322 N.C. 243, 367 S.E. 2d 639 rt instructed the jury that "the do- uading the jury as to the existence and if all twelve jurors are unable ting circumstance exists they must irkley, 308 N.C. at 217-18, 302 S.E. y could only find a mitigating cir- reed that it existed. The defendant ave instructed that the jurors could ting circumstance did not exist if it did not exist. *Id.* at 218, 302 S.E.

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mitigating circumstances must be tion of aggravating circumstances. t is only placed upon the finding of or mitigating circumstance exists. ho has the burden of *proof* and the f required to establish the existence ee no reason to distinguish the in finding the existence or nonex- d mitigating circumstances during

the sentencing procedure. It must be kept in mind that when the sentencing procedure begins there are no aggravating or mitigating circumstances deemed to be in existence. Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case.

In determining whether a mitigating circumstance exists, the jury is free to consider all the evidence relevant to that circumstance. This procedure is in accord with the requirements of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978) and *Eddings v. Oklahoma*, --- U.S. ---, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982). We therefore find no error in the trial judge's instructions to the jury concerning the unanimity requirement on mitigating circumstances.

Id. at 219, 302 S.E. 2d at 187.

We have declined to reexamine our *Kirkley* holding in several cases, including the following: *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316 (1988); *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988); *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987); *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985); *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

As a matter of state law, then, this issue is clearly settled contrary to defendant's position. Defendant contends, however, that the recent decision of the United States Supreme Court in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), requires that we overrule *Kirkley* and its progeny. In *Mills*, the Supreme Court held that the trial court's instructions to the jury were constitutionally infirm because "reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at ---, 100 L.Ed. 2d at 400.

Mills is one of a long line of cases in which the United States Supreme Court has examined the constitutionality of state

capital-sentencing schemes. The Court has faced the tensions between two concerns relating to such schemes: the constitutional requirement of individualized sentencing, and the constitutional requirement that the death penalty not be inflicted arbitrarily and capriciously. In *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973 (1978), the court recognized that "[t]he signals from this Court have not . . . always been easy to decipher" and that it had "an obligation to reconcile previously differing views in order to provide [clear] guidance." *Lockett*, 438 U.S. at 602, 57 L.Ed. 2d at 988 (plurality opinion).

The plurality opinion in *Lockett* explained how, in *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346 (1972), a plurality of the Court had concluded that "discretionary sentencing, unguided by legislatively defined standards, violated the Eighth Amendment" because it was discriminatory, "wantonly" imposed and "afforded 'no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not.'" *Lockett*, 438 U.S. at 599, 57 L.Ed. 2d at 986 (quoting *Furman*, 408 U.S. at 257, 310, 313, 33 L.Ed. 2d at 359, 390, 392). In attempting to follow *Furman*, some states adopted mandatory death penalties for certain crimes, thus eliminating any jury discretion in sentencing. *Lockett*, 438 U.S. at 599-600, 57 L.Ed. 2d at 986-87.

In the wake of *Furman*, the Court examined death penalty statutes in five states. A plurality found the mandatory death sentence statutes in Louisiana and North Carolina unconstitutional. *Roberts v. Louisiana*, 428 U.S. 325, 49 L.Ed. 2d 974 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944 (1976). A plurality also found, however, that the Georgia, Texas, and Florida statutes, which were not mandatory and which provided certain safeguards to the defendant in the capital-sentencing process, were not constitutionally invalid. *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859 (1976); *Jurek v. Texas*, 428 U.S. 262, 49 L.Ed. 2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed. 2d 913 (1976). In *Gregg*, the plurality wrote that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Gregg*, 428 U.S. at 195, 49 L.Ed. 2d at 887. From these opinions, the plurality opinion in *Lockett* concluded that "sentencing procedures should not create 'a sub-

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stantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner.'" *Lockett*, 438 U.S. at 601, 57 L.Ed. 2d at 997 (quoting *Gregg*, 428 U.S. at 188, 49 L.Ed. 2d at 902).

> In the view of the three Justices. . . . *Furman* did not require that all sentencing discretion be eliminated, but only that it be "directed and limited." 408 U.S., at 189, 49 L.Ed. 2d 859, 96 S.Ct. 2909, so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a "meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many cases in which it is not." *Id.*, at 188, 49 L.Ed. 2d 859, 96 S.Ct. 2909.

Lockett, 438 U.S. at 601, 57 L.Ed. 2d at 997-98.

The plurality opinion in *Lockett* acknowledged that mandatory death sentencing was unconstitutional. "[T]he sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Lockett*, 438 U.S. at 601, 57 L.Ed. 2d at 998 (quoting *Woodson* v. *North Carolina*, 428 U.S. at 304, 49 L.Ed. 2d at 961 (plurality opinion)). The opinion stated that "the sentencer . . . [may] not be precluded from considering as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604, 57 L.Ed. 2d at 990 (emphasis in original).

Ohio's death-penalty statute, which the Court examined in *Lockett*, mandated the imposition of the death penalty where a jury had found at least one aggravating circumstance unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the court determined that at least one of three specified mitigating circumstances had been established by a preponderance of the evidence. *Id.* at 607, 57 L.Ed. 2d at 991-92. The plurality opinion concluded that "[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments" because it "preclude[d] consideration of relevant mitigating factors." *Id.* at 608, 57 L.Ed. 2d at 992. Therefore, the Court reversed the imposition of the death penalty and remanded for resentencing. *Id.* at 608-09, 57 L.Ed. 2d at 992.

In *Eddings* v. *Oklahoma*, 455 U.S. 104, 71 L.Ed. 2d 1 (1982), the Supreme Court applied the *Lockett* rule that "the sentencer . . . [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 110, 71 L.Ed. 2d at 8 (quoting *Lockett*, 438 U.S. at 604, 57 L.Ed. 2d at 990) (emphasis in original). The trial judge in *Eddings* had stated that, as a matter of law, he could not take into consideration that the defendant had come from a violent background. *Eddings*, 455 U.S. at 112-13, 71 L.Ed. 2d at 9-10. The Supreme Court held that "the sentencer [may not] refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 114, 71 L.Ed. 2d at 11 (emphasis in original). The Court reversed the death sentence and remanded for resentencing. *Id.* at 117, 71 L.Ed. 2d at 12.

In *Mills* v. *Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384, the Supreme Court applied the *Lockett-Eddings* doctrine in holding that because the instructions to the jury on mitigating circumstances were potentially misleading, "[t]he possibility that the . . . jury conducted its task improperly . . . [was] great enough to require resentencing." *Id.* at ---, 100 L.Ed. 2d at 399. The verdict form in *Mills* had three sections:

> Section I stated:
>
> Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked "yes" has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked "no" has not been proven BEYOND A REASONABLE DOUBT[.]

Id. at ---, 100 L.Ed. 2d at 400. Following this paragraph was a list of the submitted aggravating circumstances, each of which was followed by two blanks—one for a "yes" answer, the other for a "no" answer. Section I concluded:

> (If one or more of the above are marked "yes," complete Section II. If all of the above are marked "no" do not complete Sections II and III.)

Id. at ---, 100 L.Ed. 2d at 400-01.

death penalty and remanded for re-
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455 U.S. 104, 71 L.Ed. 2d 1 (1982), he *Lockett* rule that "the sentencer rom considering, *as a mitigating fac-*nt's character or record and any of nse that the defendant proffers as a death." *Id.* at 110, 71 L.Ed. 2d at 8 604, 57 L.Ed. 2d at 990) (emphasis in *Eddings* had stated that, as a matter to consideration that the defendant ground. *Eddings*, 455 U.S. at 112-13, reme Court held that "the sentencer *, as a matter of law*, any relevant 114, 71 L.Ed. 2d at 11 (emphasis in d the death sentence and remanded 71 L.Ed. 2d at 12.

86 U.S. ---, 100 L.Ed. 2d 384, the *Lockett-Eddings* doctrine in holding e to the jury on mitigating circum-isleading, "[t]he possibility that the mproperly . . . [was] great enough to ---, 100 L.Ed. 2d at 399. The verdict ions:

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400. Following this paragraph was a vating circumstances, each of which —one for a "yes" answer, the other concluded:

bove are marked "yes," complete Sec-ve are marked "no" do not complete

400-01.

Section II stated:

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked "no" has not been proven BY A PREPONDERANCE OF THE EVIDENCE.]

Id. at ---, 100 L.Ed 2d at 401. As in the first section, the proposed mitigating circumstances, numbered 1 through 7, were listed, each with blanks for "yes" and "no." Number 8 read, "Other mitigating circumstances exist, as set forth below." *Id.* at ---, 100 L.Ed. 2d at 401-02. Section II concluded:

> (If one or more of the above in Section II have been marked "yes," complete Section III. If all of the above in Section II are marked "no," you do not complete Section III.)

Id. at ---, 100 L.Ed. 2d at 402.

Section III read:

> Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

Blanks designated "yes" and "no" followed. *Id.* at ---, 100 L.Ed. 2d at 403.

The fourth and final section read:

DETERMINATION OF SENTENCE

> Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:
>
> 1. If all of the answers in Section I are marked "no" enter "Life Imprisonment."
>
> 2. If Section III was completed and was marked "yes" enter "Life Imprisonment."
>
> 3. If Section II was completed and all of the answers were marked "no" then enter "Death."
>
> 4. If Section III was completed and was marked "no" enter "Death."

Id. at ---, 100 L.Ed. 2d at 403.

In Section I, the jury answered "yes" to one of the aggravating circumstances and "no" to the rest. In Section II, it answered "no" to mitigating circumstances 1 through 7 and "none" to number 8 (the "catchall"). Having found no mitigating circumstances, the jury did not answer Section III. It returned a death sentence in response to the mandate of number three in the final section. *Id.* at ---, 100 L.Ed. 2d at 400-03.

This sentencing scheme mandated the death penalty if the jury unanimously found at least one aggravating circumstance and did not unanimously find any mitigating circumstances. Because the jury found one aggravating circumstance and no mitigating circumstances, it was required as a matter of law to impose the death penalty without completing Section III, which called for the weighing of aggravating and mitigating circumstances.

The defendant challenged his conviction and sentence, arguing that Maryland's capital-punishment statute was unconstitutionally mandatory as applied to him, because "even if some or all of the jurors were to believe *some* mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the *same* mitigating factor, the sentence necessarily would be death." *Id.* at ---, 100 L.Ed. 2d at 392 (emphasis in original). The Supreme Court granted certiorari "[b]ecause of the importance of [this] issue in Maryland's capital-punishment scheme." *Id.* at ---, 100 L.Ed. 2d at 393.

After examining the verdict form and instructions under which the jury had sentenced the defendant to death, the Court concluded that even if the jurors had reached Section III, "they were not free . . . to consider *all* relevant evidence in mitigation as they balanced aggravating and mitigating circumstances. Section III instructed the jury to weigh only those mitigating circumstances marked 'yes' in Section II." *Id.* at ---, 100 L.Ed. 2d at 397 (emphasis in original).

> [T]here is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in at-

was completed and was marked "no"

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answered "yes" to one of the ag-
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> tempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. . . . The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.

Id. at ---, 100 L.Ed. 2d at 400. Because of the risk that the jury was improperly precluded from considering certain *relevant* mitigating evidence, the Court held that the Maryland scheme violated the doctrine articulated in *Lockett* and *Eddings*. *See id.* at ---, 100 L.Ed. 2d at 400. Therefore, the Court vacated the judgment of the Court of Appeals, insofar as it sustained the death penalty, and remanded for resentencing. *Id.* at ---, 100 L.Ed. 2d at 400.

In *Franklin v. Lynaugh*, --- U.S. ---, 101 L.Ed. 2d 155 (1988), a case decided after *Mills*, the Supreme Court again examined Texas' capital-sentencing process. That process provided for the submission of two "Special Issues" to the jury. If the jury answered "yes" to both questions, the defendant would be sentenced to death. *Id.* at ---, 101 L.Ed. 2d at 162. The defendant in *Franklin* requested instructions that the jurors should take mitigating evidence into account in answering the Special Issues, so that they could answer "no" to either one or both of the Special Issues, even if they otherwise would have answered the Special Issues "yes." *Id.* at ---, 101 L.Ed. 2d at 162-63. The trial court instead instructed the jurors that they should reach their verdict based on all the evidence. *Id.* at ---, 101 L.Ed. 2d at 163. The defendant argued that the Special Issues precluded the jury from considering certain mitigating evidence. Even though the Texas capital-sentencing process does not mention mitigating evidence, *id.* at ---, 101 L.Ed. 2d at 177 (Stevens, J., dissenting), the plurality opinion held that the Texas procedure was not unconstitutional.

The plurality opinion stated that there are "two lines of cases . . . [which] are somewhat in 'tension' with each other"—the cases holding that the jury must not be precluded from considering all relevant evidence, and the cases holding that states must channel the exercise of jury discretion, *id.* at ---, 101 L.Ed. 2d at

171, and that the procedure in Texas "accommodates *both* of these concerns." *Id.* at ---, 101 L.Ed. 2d at 171 (emphasis in original). The plurality opinion concluded that "*Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of . . . mitigating factors." *Id.* at ---, 101 L.Ed. 2d at 169.

> [T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty.

Id. at ---, 101 L.Ed. 2d at 170. States "must channel the [capital] sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Id.* at ---, 101 L.Ed. 2d at 170 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428, 64 L.Ed. 2d 398, 406 (1980) (plurality opinion) (footnotes omitted)).

Thus, the Supreme Court has given individual scrutiny to several states' capital-sentencing procedures to determine whether they were non-mandatory and allowed for individualized sentencing, yet adequately channeled the discretion of the sentencer. The Court has upheld some procedures—*see Franklin v. Lynaugh*, --- U.S. ---, 101 L.Ed. 2d 155; *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859; *Jurek v. Texas*, 428 U.S. 262, 49 L.Ed. 2d 929; *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed. 2d 913—while declaring others invalid—*see Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384; *Eddings v. Oklahoma*, 455 U.S. 104, 71 L.Ed. 2d 1; *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973; *Roberts v. Louisiana*, 428 U.S. 325, 49 L.Ed. 2d 974; *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944. Therefore, in examining the aspect of our capital-sentencing process in question here, we must look at that aspect individually and in the context of the whole.

In the case now before us, the verdict form in the sentencing phase had four sections:

The first section, Issue One, listed the submitted aggravating circumstances and asked whether the jury unanimously found

in Texas "accommodates *both* of
01 L.Ed. 2d at 171 (emphasis in
concluded that "*Lockett* does not
in structuring or giving shape to
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from the evidence the existence of any of those circumstances. The jury unanimously found the two aggravating circumstances submitted.

The second section, Issue Two, listed the submitted mitigating circumstances and asked whether the jury unanimously found from the evidence the existence of any of these circumstances. Of the eight mitigating circumstances submitted, the jury answered "yes" to two and "no" to six, including the "catch-all" ("[a]ny other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value").

The third section read:

ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO "YES." IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

Issue Three stated:

Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

Answer:

The fourth section read:

IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR.

Issue Four stated:

Do you unanimously find, beyond a reasonable doubt, that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

Answer:

The jury answered "yes" to Issues Three and Four and returned a recommendation of the death penalty.

Our capital-sentencing procedure, as this case shows, differs in two significant ways from Maryland's procedure:

First, the instructions to the jury as to when it must impose the death penalty are different. Maryland's procedure required the jury to impose the death penalty if it "found" at least one aggravating circumstance and did not "find" any mitigating circumstances. It also required the jury to impose the death penalty if it unanimously found that the mitigating circumstances did not outweigh the aggravating circumstances. Issue Three here requires the jury to weigh the "found" mitigating circumstances against the "found" aggravating circumstances. In contrast to the Maryland procedure, however, it does not mandate the death penalty where there are no mitigating circumstances and at least one aggravating circumstance, nor does it mandate the death penalty if the mitigating circumstances do not outweigh the aggravating circumstances. Rather, it requires the jury then to answer Issue Four. Issue Four ensures that a jury may return a recommendation of life imprisonment if it feels that the aggravating circumstances are not sufficiently substantial to call for the death penalty, even if it has found several aggravating circumstances and no mitigating circumstances. Maryland's capital-sentencing procedure, which the Supreme Court found constitutionally infirm in *Mills*, did not include a section equivalent to Issue Four here.

Second, in North Carolina evidence in effect becomes legally irrelevant to prove mitigation if the defendant fails to prove to the satisfaction of all the jurors that such evidence supports the finding of a mitigating factor. "Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case." *State v. Kirkley*, 308 N.C. 196, 218, 302 S.E. 2d 144, 157 (1983). A requirement that the defendant must carry a certain evidentiary burden to prove the existence of a mitigating factor is a proper limitation of the jury's discretion. *See Patterson v. New York*, 432 U.S. 197, 201, 209, 53 L.Ed. 2d 281, 286-87, 291 (1977) (states normally have the power to regulate burdens of production and persuasion and "[i]f the State . . . chooses to recognize a factor that mitigates the degree of criminality or punishment, . . . the State may 'assure itself that the fact has been established with reasonable certainty'"). The instructions and verdict form in our capital-sentencing procedure serve to channel the jury's discretion by ensuring that, when

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the jury makes its final sentencing determination, it will only consider evidence which we have, in effect, determined to be relevant. If all the jurors do not agree on the existence of a specific mitigating circumstance, then the defendant has failed to meet his or her burden of proof on that circumstance and the evidence regarding it is not legally relevant for sentencing purposes. Therefore, the instruction to the jury to weigh only the mitigating circumstances "found" by a unanimous vote was an instruction to consider only the relevant mitigating evidence in answering Issues Three and Four.

In *Mills*, the Maryland Court of Appeals had held that jurors could only mark "no" on a mitigating circumstance when they unanimously found that mitigating circumstance not to exist. *Mills v. State*, 310 Md. 33, 56, 527 A. 2d 3, 13 (1987). Where some, but not all, jurors agreed on the existence of a mitigating circumstance, the jury could not mark "no" to that circumstance; thus, unlike in North Carolina, the mitigating evidence introduced to support that mitigating circumstance remained legally relevant even though the jurors did not agree unanimously on the existence of the mitigating circumstance.

The fact that such evidence remained legally relevant apparently was significant in the Supreme Court's resolution of *Mills*. The Court noted that "[n]o one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered legally 'irrelevant' by one holdout vote." *Mills v. Maryland*, --- U.S. at --- n.7, 100 L.Ed. 2d at 394 n.7. The Court went on to state that the problem in *Mills* was that in answering Section III of the verdict form, the jurors "were not free . . . to consider *all relevant evidence* in mitigation as they balanced aggravating and mitigating circumstances." *Id.* at ---, 100 L.Ed. 2d at 397 (emphasis added). The instructions in *Mills* were potentially misleading and thus inadequate because they did not clearly permit the jury to consider all relevant evidence. Under North Carolina law, the jury is not prevented from considering relevant mitigating evidence at any time during sentencing.

Like the United States Supreme Court, *see Godfrey v. Georgia*, 446 U.S. at 428, 64 L.Ed. 2d at 406, we have emphasized the need for guided discretion in the capital-sentencing process. In *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, ---

U.S. ---, 98 L.Ed. 2d 406 (1987), the defendant argued that the trial court erroneously instructed the jury that it could only consider the "found" mitigating circumstances in weighing the mitigating and aggravating circumstances. He contended that the jury should have been able to consider circumstances not "found" by the jury and even circumstances which had not been written on the verdict form. *Id.* at 217, 358 S.E. 2d at 25-26. We stated that such a procedure would "sanction an invitation to caprice" in the sentencing phase of a capital trial. *Id.* at 217, 358 S.E. 2d at 26. We discussed the concern, often articulated by the United States Supreme Court, that the jury's discretion must be limited to prevent arbitrary and capricious infliction of the death penalty:

> "The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances." There is no reason to confound the jury's decision process with arbitrary, "inarticulable" factors that may be applied in mitigation of a sentence but not in aggravation of it. "[T]he jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the 'carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused.' "

Id. at 217-18, 358 S.E. 2d at 26 (citations omitted); *see also State v. Kirkley*, 308 N.C. at 219, 302 S.E. 2d at 157.

[17] Our capital-sentencing procedure allows for individualized sentencing. It allows the jury to find circumstances in mitigation, both submitted circumstances and any other circumstance the jury deems to have mitigating value. It allows the jury to consider all relevant evidence in deciding whether to recommend a sentence of death. Finally, it requires the jury—before recommending that the defendant be sentenced to death—to weigh the "found" aggravating and "found" mitigating circumstances and to decide whether the "found" aggravating circumstances, considered with the "found" mitigating circumstances, are sufficiently substantial to call for the death penalty.

In addition to allowing for individualized sentencing, our capital-sentencing procedure also guides the jury's discretion so as to guard against the arbitrary and capricious infliction of the death penalty. It requires the State to prove the existence of an

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aggravating circumstance beyond a reasonable doubt. It requires the defendant to prove the existence of a mitigating circumstance by a preponderance of the evidence. It then allows the jury to consider only that evidence which is relevant, i.e., the evidence which the jury has unanimously "found," in sentencing the defendant.

Our capital-sentencing procedure thus provides a proper balance between individualized sentencing and guided discretion and therefore, we believe, conforms with federal constitutional requirements.

The Supreme Court granted certiorari in *Mills* "[b]ecause of the importance of the issue in Maryland's capital-punishment scheme." *Id.* at ---, 100 L.Ed. 2d at 290. The decision in *Mills* thus appears to be statute-specific. This conclusion is further supported by the Court's treatment of three cases immediately after the decision in *Mills*. The Court denied certiorari in two cases from this state which raised the issue of whether North Carolina's requirement of jury unanimity on the existence of mitigating circumstances is unconstitutional. *See State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988); *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1963), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 934 (1988). However, in a Maryland case raising the same issue as in *Mills*, the Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Mills*. *See Jones v. Maryland*, 310 Md. 569, 530 A. 2d 743 (1987), *cert. granted and judgment vacated*, --- U.S. ---, 100 L.Ed. 2d 916 (1988). We recognize that "a denial of a petition for a writ of certiorari . . . carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919, 94 L.Ed. 562, 566 (1950) (Frankfurter, J., opinion re: denial of certiorari); *see also Singleton v. Commissioner of Internal Revenue*, 439 U.S. 940, 944, 58 L.Ed. 2d 335, 336 (1978) (Stevens, J., opinion re: denial of certiorari). We do not suggest that the denial of certiorari in *Holden* and *Gardner* alone indicates that the Court decided that the defendants' arguments in those cases were without merit. However, we view the Court's action on *Jones* and its different treatment of *Holden* and *Gardner*, all in the immediate wake of *Mills*, as some indication that our capital-sentencing procedure differs sufficient-

ly from Maryland's that *Mills* does not control the question presented here.

In light of the foregoing precedent from the United States Supreme Court and from this Court, the differences between our capital-sentencing procedure and the Maryland procedure addressed by the Supreme Court in *Mills*, and the Supreme Court's treatment of *Jones*, *Holden*, and *Gardner* in the immediate wake of *Mills*, we are unable to conclude with any degree of certainty that *Mills* rendered our capital-sentencing procedure constitutionally infirm. We believe our clear, stable, considered procedure, established by *Kirkley* and adhered to in its progeny, is properly responsive to the requirement that capital-sentencing schemes provide for both individualized sentencing and guided sentencer discretion. We thus continue to adhere to our decisions in *Kirkley* and its progeny and hold that the instructions in question were without error.

Defendant raises the following "preservation" issues:

[18] (1) He contends that the trial court erred in denying his motion to require the State to disclose potential aggravating circumstances it intended to rely upon at sentencing. Such disclosure is not required. *State v. Holden*, 321 N.C. 125, 153-54, 362 S.E. 2d 513, 531 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988).

[19] (2) He contends that the trial court erred in placing the burden of proving the existence of mitigating circumstances on him rather than on the State. This was not error. *State v. Brown*, 320 N.C. 179, 216, 358 S.E. 2d 1, 25, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987).

[20] (3) He contends that the trial court erred in instructing the jury that it must recommend a death sentence if it answered issue four[1] affirmatively. This was not error. *State v. McDougall*, 308 N.C. 1, 26, 301 S.E. 2d 308, 323-24, *cert. denied*, 464 U.S. 985, 79 L.Ed. 2d 179 (1983).

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1. This issue was as follows: "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?"

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[21] (4) He contends that the trial court erred in sentencing him to death because N.C.G.S. § 15A-2000(e)(3)[1] is unconstitutionally vague and overbroad, both facially and as applied. The argument is without merit. *State v. Brown*, 320 N.C. at 213-14, 358 S.E. 2d at 23-24.

(5) He contends that N.C.G.S. § 15A-2000 in its entirety is unconstitutional. The argument is without merit. *State v. Brown*, 315 N.C. 40, 60-61, 337 S.E. 2d 808, 823-24 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E. 2d 373 (1988).

Defendant has not persuaded us that we should depart from our prior holdings on these "preservation" issues, and we decline to do so.

We conclude that the sentencing phase of defendant's trial was fair and free of prejudicial error.

PROPORTIONALITY REVIEW

Because we have found no error in the guilt and sentencing phases, we are required to review the record and determine: (1) whether the record supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1983); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E. 2d 279, 313 (1987).

The jury found, as aggravating circumstances, that (1) defendant had been convicted previously of a felony involving the use of violence to the person, and (2) the murder was committed against a deputy sheriff while engaged in the performance of his official duties. N.C.G.S. § 15A-2000(e)(3), (8) (1983). As to the first aggravating circumstance, the State presented uncontroverted documentary evidence establishing that defendant previously had

1. This statute establishes, as an aggravating circumstance which the jury may consider, the following: "The defendant had been previously convicted of a felony involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3) (1983).

pled guilty to second degree murder and been sentenced to imprisonment of not less than twenty-two nor more than twenty-eight years. As to the second aggravating circumstance, the record contains plenary, uncontroverted evidence that the victim was, at the time of the shooting, a deputy sheriff engaged in the performance of his official duties. The record thus fully supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentence of death.

We find nothing in the record which suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

[22] In conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 79, 337 S.E. 2d 808, 829 (1985). We use the "pool" of similar cases announced in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). *Id.* However, "[w]e do not find it necessary to extrapolate or analyze in our opinions all, or any particular number, of the cases in our proportionality pool." *State v. Robbins*, 319 N.C. at 529, 356 S.E. 2d at 316 (emphasis in original).

The crime here was committed against a law enforcement officer while he was engaged in the performance of his official duties. We have noted that this aggravating circumstance, found in N.C.G.S. § 15A-2000(e)(8), reflects the General Assembly's recognition of the "common concern" that "the collective conscience requires the most severe penalty for those who flout our system of law enforcement." *State v. Brown*, 320 N.C. at 230, 358 S.E. 2d at 35.

> The murder of a law enforcement officer *engaged in the performance of his official duties* differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public – the body politic – and is a direct attack upon the rule

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State v. Hill, 311 N.C. 465, 480, 319 S.E. 2d 163, 177 (1984) (Mitchell, J., dissenting).

Defendant argues that *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163, where a majority of this Court found the death sentence disproportionate, is the case in the pool most comparable to this one. We disagree. The defendant in *Hill* shot and killed a police officer in a struggle that ensued when the officer tackled the defendant. A significant factor in this Court's holding that the death sentence was disproportionate was "the incredibly short amount of time involved." *State v. Hill*, 311 N.C. at 479, 319 S.E. 2d at 172. *See also State v. Abdullah*, 309 N.C. 62, 306 S.E. 2d 100 (1983), where an officer entered a store while a robbery was in progress, the defendant's response in shooting him was almost instantaneous, and the jury recommended a life sentence. Here, by contrast, the killing followed a considerable period during which law enforcement officers and a neighbor attempted to persuade defendant to stop the shooting, and during which defendant expressly said to the victim: "You leave or I'll kill you."

Further, unlike in the present case, there is no indication in *Hill* or *Abdullah* that the defendants in those cases had been convicted previously of a felony involving violence against the person. We thus conclude that those cases are not sufficiently comparable to the present case to suggest or require a holding that the death sentence here is disproportionate.

Rather, the more comparable case is *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). There, "the record clearly establish[ed] a course of conduct on the part of the defendant which amount[ed] to a wanton disregard for the value of human life and for the enforcement of the law by duly appointed authorities." *Id.* at 337, 279 S.E. 2d at 810. We concluded that under such circumstances the sentence of death was not disproportionate or excessive, considering both the crime and the defendant. *Id.* at 337-38, 279 S.E. 2d at 810.

Here, as in *Hutchins*, on the day of the murder defendant engaged in a course of conduct that showed a wanton disregard for the value of human life. His episodic, random shooting—despite several warnings to stop it—threatened all who inhabited, or ventured into, the neighborhood. His ultimate violent act, which followed his own warning to the victim to "leave or I'll kill you," struck at the enforcement of the law by duly appointed authorities.

Thus, as in *Hutchins*, we conclude that nothing about the crime renders defendant's sentence of death disproportionate or excessive.

As to the defendant, the jury found—supported by competent, uncontroverted evidence—that he previously had been convicted of a felony involving the use of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1983). As noted, the record establishes that defendant had pled guilty to second degree murder and had been sentenced to imprisonment of not less than twenty-two nor more than twenty-eight years.[3] Defendant's prior offense thus involved the unlawful killing of another human being with malice, *see State v. Robbins*, 309 N.C. 771, 775, 309 S.E. 2d 188, 190 (1983), and was therefore among the most serious of the many felonies "involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3) (1983).

In *State v. Brown*, we note that the aggravating circumstance provided for in N.C.G.S. § 15A-2000(e)(3) "reflect[s] upon the defendant's character as a recidivist." 320 N.C. at 224, 358 S.E. 2d at 20. The jury in *Brown* found only the "prior violent felony" aggravating circumstance, *id.* at 219, 358 S.E. 2d at 27, whereas the jury here found the additional aggravating circumstance that the offense was committed against a law enforcement officer while he was engaged in the performance of his duties. N.C.G.S. § 15A-2000(e)(8) (1983). Further, the prior violent felony in *Brown* was the discharge of a shotgun into an occupied building—*id.* at 232, 358 S.E. 2d at 34—a considerably less serious offense than second degree murder, the prior violent felony here. We concluded in *Brown* that we could not hold as a matter of law

3. We take judicial notice of our own records—*In re Trucking Co.*, 285 N.C. 332, 337, 206 S.E. 2d 172, 176 (1974); *In re Williamson*, 67 N.C. App. 184, 185, 312 S.E. 2d 239, 240 (1984)—and note that prior to entering his plea of guilty of second degree murder on this charge, defendant had been found guilty of first degree murder and sentenced to death. This Court, however, awarded a new trial for errors in the instructions. *See State v. McKoy*, 296 N.C. 121, 71 S.E. 2d 901 (1982).

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that the death sentence was disproportionate. *Id.* at 231, 358 S.E. 2d at 34. *A fortiori*, the more serious nature of the total criminal conduct of the defendant here dictates the same conclusion.

We have carefully considered the circumstances of the offense and the character and propensities of the defendant as revealed by the record, briefs, transcript and arguments. We conclude that the facts of this case, combined with defendant's history, support the jury's decision to impose the ultimate penalty of death. We thus hold that the death sentence imposed is not disproportionate within the meaning and intent of N.C.G.S. § 15A-2000(d)(2). Upon this holding the death sentence is affirmed. "This Court has no discretion in determining whether a death sentence should be vacated. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703; *see Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973." *State v. Robbins*, 319 N.C. at 529, 356 S.E. 2d at 317.

No error.

Chief Justice EXUM dissenting.

I join in the dissenting opinions of Justice Martin and Justice Frye. I also dissent from the majority's position that *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), does not require us to overrule *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983), *overruled in part on other grounds, State v. Shank*, 322 N.C. 243, 367 S.E. 2d 639 (1988); and I write separately in support of my position that *Mills* does require us to overrule *Kirkley* and its progeny.

In *Kirkley* the question arose for the first time in this jurisdiction as to whether a jury in a capital sentencing proceeding must agree unanimously that a mitigating circumstance existed in order to consider that circumstance in the ultimate determination of whether the defendant should live or die. At the sentencing phase of Kirkley's trial the unanimity issue was not addressed in the trial court's initial jury instructions. After some deliberation the jury returned to the courtroom to ask specifically whether it must agree unanimously on each mitigating circumstance before it could continue to consider that circumstance in determining whether to impose death or life imprisonment. The trial court instructed the jury that it must unanimously agree on

each mitigating circumstance before it could continue to consider it in the ultimate balancing process. A majority of this Court in *Kirkley* held, contrary to the position of both the defendant and the state, that there was no error in the trial court's supplemental instructions on the unanimity question, saying, "Certainly consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." *Kirkley*, 308 N.C. at 218, 302 S.E. 2d at 157.

Dissenting on this issue in *Kirkley*, I adopted essentially what was then the state's position. The state in its brief in *Kirkley* said:

> *Lockett v. Ohio*, 438 U.S. 586 [57 L.Ed. 2d 973] (1978), holds that a statute that prevents the sentencer in all capital cases from giving independent weight to aspects in mitigation creates a risk that a death penalty will be imposed in spite of factors which call for a less severe penalty and thus is unconstitutional. It would seem manifestly improper, then, not to permit members of a jury to consider a factor in mitigation simply because all members of the jury were not satisfied with the defendant's showing concerning a particular mitigating circumstance. It would also make any sentencing procedure unmanageable if each time a jury deadlocked on an issue a new sentencing hearing was required.
>
> It is the State's position that only those mitigating circumstances found unanimously to exist should be listed on the verdict sheet recommended in *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 [72 L.Ed. 2d 155] (1982). *However, no juror should be precluded from considering anything in mitigation in the ultimate balancing process even if that mitigating factor was not agreed upon unanimously. To do otherwise, the State believes, could run afoul of Lockett v. Ohio, supra.*

Kirkley, 308 N.C. at 229, 302 S.E. 2d at 193 (emphasis supplied). I wrote in my *Kirkley* dissent:

> While the state's position on this question might pass constitutional muster, I think the better practice would be to instruct: (1) unanimity is not required in order to answer the

before it could continue to consider process. A majority of this Court in e position of both the defendant and error in the trial court's supplemen- nity question, saying, "Certainly bon- that a jury unanimously find that a sts before it may be considered for *Kirkley*, 308 N.C. at 218, 302 S.E. 2d

e in *Kirkley*, I adopted essentially position. The state in its brief in

8 U.S. 586 [57 L.Ed. 2d 973] (1978), prevents the sentencer in all capital endent weight to aspects in mitiga- a death penalty will be imposed in ll for a less severe penalty and thus uld seem manifestly improper, then, f a jury to consider a factor in miti- members of the jury were not satis- 's showing concerning a particular It would also make any sentencing if each time a jury deadlocked on an hearing was required.

dition that only those mitigating cir- imously to exist should be listed on mended in *State v. Rook*, 304 N.C. 681), *cert. denied*, 455 U.S. 1038 [72 *wever, no juror should be precluded ag in mitigation in the ultimate bal- hat mitigating factor was not agreed otherwise, the State believes, could Ohio, supra.*

S.E. 2d at 163 (emphasis supplied). I

osition on this question might pass think the better practice would be to not required in order to answer the

> question of the existence of a mitigating circumstance favorably to defendant; (2) such an issue should be answered unfavorably to defendant only if all jurors agreed to so answer it; (3) such an issue should be answered favorably to defendant if any juror would so answer it with an indication on the verdict form as to how many jurors so voted; and (4) in the final balancing process each juror would be free to consider only those mitigating circumstances which he or she were persuaded existed in the case.

Kirkley, 308 N.C. at 229-30, 302 S.E. 2d at 163. I still adhere to this position.

Despite the majority's valiant effort to explain *Mills* away, the *Mills* holding cannot be reconciled with our *Kirkley* holding on the unanimity question. Instead the *Mills* holding squarely sustains the position both the state and I took in *Kirkley* on this issue. Whatever escape from the *Mills* holding might be provided by differences in Maryland's and North Carolina's capital sentencing scheme or by the posture in which the *Mills* case reached the Supreme Court is effectively closed, it seems to me, by the rationale of the *Mills* decision as expressed in the opinion itself.

The majority correctly identifies the *Mills* holding: *Jury* instructions in a capital sentencing proceeding which create "a substantial probability that reasonable jurors . . . may well have thought that they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance" are constitutionally infirm under the Supreme Court's Eighth Amendment jurisprudence. *Mills*, 486 U.S. at ---, 100 L.Ed. 2d at 400. Our *Kirkley* holding is precisely to the contrary and should, therefore, yield.

The majority chooses instead to distinguish *Mills* on the basis of two circumstances urged upon this Court by the state as legally material differences.

The first difference suggested is that in Maryland a capital sentencing *jury* which finds at least one aggravating circumstance and fails to find any mitigating circumstances never engages in a balancing process and must return a sentence of death. In North Carolina even if one or more aggravating circumstances and no mitigating circumstances are found, the *jury* may nevertheless

elect not to impose the death penalty on the basis that the aggravating circumstances are themselves not sufficiently substantial to call for its imposition.

Relying on this difference in the two states' sentencing schemes as justification for continuing our *Kirkley* unanimity requirement ignores the rationale underlying the *Mills* holding as it is explained in the *Mills* opinion. It is true that the Supreme Court in *Mills* was concerned that a single holdout juror in Maryland on mitigating circumstances might force the imposition of the death penalty. The last substantive sentence of the *Mills* opinion is, "[t]he possibility that a single juror could block [consideration of mitigating evidence], and consequently require the jury to impose the death penalty, is one we dare not risk." *Mills*, 486 U.S. at ---, 100 L.Ed. 2d at 400. Indeed, in *Mills* the jury found the one aggravating circumstance submitted, found none of the several mitigating circumstances submitted and on that basis returned a sentence of death.

In Maryland, however, a jury finding one or more aggravating circumstances to exist and one or more mitigating circumstances to exist would then balance the conflicting sets of circumstances by determining whether the mitigating circumstances outweigh the aggravating. In this situation the Maryland sentencing scheme is indistinguishable in principle from North Carolina's.

In North Carolina when both mitigating and aggravating circumstances are found the *jury* must determine whether the mitigating circumstances are insufficient to outweigh the aggravating. If they are insufficient, then the aggravating circumstances must be considered with the mitigating circumstances and found to be sufficiently substantial to warrant imposition of the death penalty. In both balancing processes only those mitigating circumstances found to exist by all twelve jurors can be considered. Eleven jurors are prevented from considering mitigating circumstances they might wish to consider in these final balancing processes if the one remaining juror refuses to do so. This amounts to contradicting *Mills* by unconstitutionally precluding jurors in North Carolina from considering mitigating circumstances when they ultimately determine whether to impose the death penalty.

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The *Mills* rationale as expressed in the opinion leads inescapably to the conclusion that its holding would apply to a Maryland case whether the jury found no mitigating circumstance or at least one but not all the mitigating circumstances submitted to it. Since in this situation Maryland's capital sentencing scheme is no different from North Carolina's, it must follow that the *Mills* holding applies equally to North Carolina's capital sentencing scheme.

The Eighth Amendment jurisprudence upon which *Mills* rests is that in a capital case the sentencing authority may not be precluded from considering any relevant mitigating circumstance which might be proffered by the defendant as reasonably justifying a sentence other than death. *Skipper v. South Carolina*, 476 U.S. 1, 4, 90 L.Ed. 2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110, 71 L.Ed. 2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L.Ed. 2d 973 (1978). This jurisprudence is summarized at the outset of the substantive discussion in *Mills*. *Mills*, 486 U.S. at ---, 100 L.Ed. 2d at 393-94. Later in its opinion the Supreme Court posits a Maryland capital sentencing process under which the jury actually reaches the balancing stage, saying:

> Ordinarily, a Maryland jury reaches the balancing stage of the deliberation process any time it unanimously finds at least one mitigating circumstance, or, under the interpretation adopted by the Court of Appeals in this case, any time the jury does not unanimously reject all mitigating circumstances. Had the jurors that sentenced petitioner reached Section III, they would have found that even if they had read the verdict form as the Court of Appeals suggests they could have, and marked "yes" or "no" only on the basis of unanimity as to either, they were not free at this point to consider all relevant evidence in mitigation as they balanced aggravating and mitigating circumstances. Section III instructed the jury to weigh only those mitigating circumstances marked "yes" in Section II. Any mitigating circumstance not so marked, even if not unanimously rejected, could not be considered by any juror. A jury following the instructions set out in the verdict form could be "precluded from considering, as a *mitigating factor*, [an] aspect of a defendant's character or record [or] a circumstance[s] of the offense that the defendant proffer[ed] as a basis for a sentence less than death,"

> *Skipper v. South Carolina*, 476 U.S. at 4, 90 L.Ed. 2d 1, 106 S.Ct. 1669, if even a single juror adhered to the view that such a factor should not be so considered.

Mills, 486 U.S. at ---, 100 L.Ed. 2d at 397 (footnote omitted). Footnote 14 presses the point further:

> For example, some jurors in this case might have found that petitioner's age, 39, constituted a mitigating factor, i.e., youthfulness, under § 413(g)(5). Indeed, in his sentencing report the trial judge noted: "There was evidence from which the jury could have found the existence of Mitigating Circumstance No. 5 (youthful age)." App. 108. Other jurors, on the other hand, might have accepted the prosecutor's argument that petitioner was "not youthful in terms of the criminal justice system," id., at 79, because of his history of criminal activity. Under such circumstances, the lack of unanimity would have prevented the jury from marking that answer "yes." Regardless of whether the answer was marked "no" or left blank, the instructions in Section III would prevent those jurors who thought petitioner's youthfulness was relevant to the ultimate sentencing decision from giving that mitigating circumstance any weight.

Mills, 486 U.S. at ---, 100 L.Ed. 2d at 397-98 n.14.

The majority next attempts to distinguish *Mills* on the basis of the posture in which that case reached the Supreme Court. The majority notes that the Maryland Court of Appeals in its *Mills* opinion and the State of Maryland before the United States Supreme Court both conceded that mitigating evidence continued to be legally relevant even if the jury does not unanimously find it to have mitigating value; but in North Carolina such evidence ceases to be legally relevant if rejected by even one juror.

This argument stands *Mills* and the Eighth Amendment jurisprudence upon which it rests on their respective heads. The jurisprudence so far developed by the Supreme Court in a series of cases to which I have already referred is that the Eighth and Fourteenth Amendments preclude a state from creating barriers to the consideration by a capital sentencer of all evidence which may reasonably be said to have mitigating value. It makes no dif-

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ference what form these barriers take. The Supreme Court said unequivocally in *Mills*:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio, supra; Hitchcock v. Dugger*, 481 U.S. ---, 95 L.Ed. 2d 347, 107 S.Ct. 1821 (1987); by the sentencing court, *Eddings v. Oklahoma, supra*; or by an evidentiary ruling, *Skipper v. South Carolina, supra*. *The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance.* Whatever the cause, . . . the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." *Eddings v. Oklahoma*, 455 U.S. at 117, n*, 71 L.Ed. 2d 1, 102 S.Ct. 869 (O'Connor, J., concurring).

Mills, 486 U.S. at ---, 100 L.Ed. 2d at 394 (emphasis supplied).

"[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 345, 83 L.Ed. 2d 720, 737 (1985), quoting Fed. R. Evid. 401. As noted by Thayer, "The law furnishes no test of relevancy." E. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 265 (1898). The concept of logical relevancy employed in Rule 401 must be kept separate from issues of sufficiency of evidence for any purpose such as to satisfy a burden of production. M. Graham, *Handbook of Federal Evidence* § 401.1 (2d ed. 1986). This concept of relevancy is the same in the context of mitigating evidence in a capital sentencing proceeding as it is in other contexts. Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone

convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered. *Id.* at § 401.1 n.12.

To say, as the majority here does, that jury unanimity on a mitigating factor is necessary to make that factor legally relevant in the final balancing process seems not only to be a misuse of the concept of relevancy but also a classical case of circular reasoning with regard to the constitutional question presented. When the Supreme Court speaks in *Mills* of the constitutional necessity for permitting the sentencer in a capital case to "consider" all mitigating evidence in determining whether to impose or not to impose the death penalty, it clearly has reference to that stage of the process where the final sentencing decision is being made. It is at that stage where under *Mills* and its predecessors any juror must not be precluded from considering evidence that juror might reasonably believe to have mitigating value. It is not enough that the juror be permitted to "consider" the mitigating evidence at the point when the jury is trying to determine whether any particular mitigating circumstances exist. There is no question that all jurors were permitted to consider such evidence at that stage of the process in *Mills*.

Rather, the question presented in *Mills* is whether at the ultimate decision-making stage of a capital sentencing proceeding it is constitutionally permissible to preclude any juror from considering a mitigating circumstance that juror believes to exist because not all jurors agree on its existence. *Mills* answers that question "no." It also makes clear that the question must be answered "no" notwithstanding any procedural devices a state may employ to preclude the sentencer's consideration of mitigating factors at the ultimate decision-making stage. This means to me that North Carolina cannot preclude jurors from considering mitigating evidence at that stage by labeling the evidence legally irrelevant.

The majority relies in part on *Franklin v. Lynaugh*, --- U.S. ---, 101 L.Ed. 2d 155 (1988), for the proposition that it is permissible for states to structure, direct and focus the jury's consideration of mitigating evidence. Guiding and structuring the jury's consideration of mitigating evidence is one thing; precluding the jury's consideration of such evidence at the final decision-making

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stage is quite another. *Lynaugh* permits the former; *Mills* prohibits the latter. Indeed, the Supreme Court concluded the instructions in *Lynaugh* were not constitutionally infirm "[b]ecause we do not believe that the jury instructions or the Texas Special Issues precluded jury consideration of any relevant mitigating circumstances in this case, or otherwise unconstitutionally limited the jury's discretion . . . ." *Lynaugh*, --- U.S. at ---, 101 L.Ed. 2d at 171.

Because the majority's reliance on the Supreme Court's denial of certiorari in two North Carolina cases in which the *Mills* issue was raised is sparing and properly carries with it the recognition that such denials mean nothing with regard to the Court's views on the merits of the case, I see little need to respond to this aspect of the majority's opinion. Suffice it to say that, according to the authorities cited by the majority, the Supreme Court's position on the issue of the unanimity requirement vis-a-vis mitigating circumstances in a capital sentencing procedure should be determined entirely from its holding and its analysis in *Mills* and not at all from its denials of applications for writs of certiorari in cases in which this issue might have been raised.

Justice FRYE joins in this dissenting opinion.

Justice FRYE dissenting.

Believing that the defendant has not received a fair and impartial trial, I dissent from the majority's decision in both the guilt-innocence and sentencing phases of the trial. First, I am convinced that under the totality of the circumstances, defendant's oral confession was not knowingly and voluntarily made and, for that reason, its admission in evidence against him was error. These circumstances are set out in some detail in the dissenting opinion of Justice Martin in which he concludes that the defendant is entitled to a new trial. I concur in that portion of his opinion.

I also conclude that the defendant is entitled to a new sentencing hearing as stated in the dissenting opinion of the Chief Justice for the reasons stated in his dissenting opinion.

I write separately because I disagree with the majority's treatment of two other issues which bear directly upon the guilt-

innocence phase of the trial and indirectly, if not directly, upon the jury's determination of whether the defendant should receive life imprisonment or the death penalty. My first difference with the majority relates to its treatment of the fact that both the trial court and the prosecutor informed the jury that the trial was subject to appellate review.

Defendant argued that the fact that both the trial court and the district attorney informed the jury that defendant's trial was subject to appellate review constitutes reversible error; that conveying that information to the jury fatally undermined the reliability of the jury's determination that defendant was guilty of murder in the first degree and the jury's conclusion that death was the appropriate punishment. The majority responds by reviewing this Court's decisions in *State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975), and *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979), and the United States Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed. 2d 231 (1985), concluding that those cases

> stand for the proposition that statements by the trial court or prosecutor that tend to dilute the jury's sense of responsibility for its determinations by suggesting that its verdict will be reviewed, or that the punishment imposed will be withheld, are impermissible and prejudicial. *See* 75 Am. Jur. 2d *Trial* § 230 (1974) ('[c]omments . . . on the power of the court to suspend sentence or to set the jury's verdict aside, or statements that a higher court has the power to review the finding of the jury on the weight of the evidence, are calculated to induce the jury to disregard their responsibility, and are improper.').

The majority then proceeds to distinguish the above cases from the instant case. I find those cases controlling. In *White*, the prosecutor told the jury that "[if] any error is made in this court, [the Supreme] Court will say." *White*, 286 N.C. at 402, 211 S.E. 2d at 449. Here, the prosecutor argued, "[t]here is a right of appeal to any interpretation of laws and application of laws which are present in this case."

Further, in *White* the court stated to the jury that "the Supreme Court will review this case." *Id.* at 402, 211 S.E. 2d at 449. This Court concluded that by that "positive statement . . .

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court stated to the jury that "the this case." *Id.* at 402, 211 S.E. 2d at at by that "positive statement . . .

the jury was bound to have understood that the court assumed [that] their verdict would be guilty." *Id.* at 404, 211 S.E. 2d at 450-51. Here, the judge told the jurors that the court reporter

> will be taking down everything that's said or done during the trial so that everything is a matter of public record and then she can type up a transcript of a trial and they mail it down to the Supreme Court and the Supreme Court can review what we're doing up here in Stanly County.

The majority draws a distinction between the use of the words "will review" in *White* and "can review" in the instant case. The distinction, in context, is too fine. As this Court made clear in *White*, a jury in a capital case must weigh the evidence and find the facts on the assumption that whatever verdict they render will be the final disposition of the case. When the judge tells the jurors that the court reporter is taking everything down so that it is a matter of public record, that it will be mailed down to the Supreme Court so that the Supreme Court can review "what we're doing up here in Stanly County," reasonable jurors could easily believe, as stated by this Court, in *State v. Jones*, 296 N.C. 495, 500, 251 S.E. 2d 425, 428, "that the Supreme Court would share with them a burden and responsibility which was in fact their sole responsibility." This belief is further encouraged when the court overrules defendant's objection to the prosecutor's argument that if convicted defendant can appeal on points of law. As Chief Justice Sharp intimated in *White*, jurors may not fully comprehend "the nature of the Supreme Court's review of a case upon appeal and . . . the difference between 'triers of the facts' and judges of the law." *White*, 286 N.C. at 404, 211 S.E. 2d at 450. Here, the trial judge both directly told the jury that its verdict was subject to appellate review and, subsequently, sanctioned the State's comments on that subject by overruling defendant's timely objection. Given those facts and the prior holdings of this Court, defendant's conviction and sentence of death should be vacated and this case remanded for a new trial.

I also disagree with the majority's treatment of defendant's contention that the trial court erred by allowing the prosecutor, during voir dire, to "stake out" the jurors by obtaining commitments from them to disregard defendant's intoxication in determining the existence of premeditation and deliberation and to

reject his voluntary intoxication defense. The purpose of voir dire examination of prospective jurors is to secure an impartial jury. *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978). To assure that end, this Court has repeatedly held it improper for counsel to "stake out" jurors during voir dire by posing hypothetical questions designed to elicit in advance what a juror's decision will be under a certain state of evidence or upon a given state of facts. *See, e.g., State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986); *State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786 (1985); *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1981); *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *modified as to death penalty*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976).

The prosecutor asked the prospective jurors "if it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you in your opinion to have sympathy for him and allow that sympathy to affect your verdict?" The jurors assured the prosecutor that they would not let that fact influence their decision. Further, at the sentencing stage, the prosecutor stated "he was drinking liquor and I told you before you were chosen as a juror that if it is shown that he's intoxicated, were you going to have sympathy, sympathetic to his cause. As I recall, you said you wouldn't."

Allowing the prosecutor to seek and obtain commitments from the jurors was tantamount to asking them to ignore evidence of intoxication in reaching their verdict and in determining the appropriate sentence. The evidence of defendant's intoxication was overwhelming. Deputy Sheriff Lambert went to defendant's home in response to a report that defendant was drunk and firing a shotgun. Deputy Lambert testified that defendant would mumble but he could not understand him and that defendant, though standing, was "wobbly." The emergency room physician testified that defendant had a strong odor of alcohol, did not respond coherently to the doctor's questions, and, notwithstanding a laceration to his skull and a wound to his left buttocks, did not complain of any pain and was not given any medication for pain. Defendant had a blood alcohol level of .264 shortly after the shooting. Dr. Robert Rollins, clinical director of the Dorothea Dix forensic psychiatry unit, included among defendant's diagnoses: "episodic alcohol abuse," "alcohol intoxication, recovered," and

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"organic delusional syndrome." In Dr. Rollins' professional opinion, defendant could not distinguish between right and wrong at the time of the offense and could not have formed the specific intent to kill the officer. In the opinion of Dr. Patricio Lara, another Dorothea Dix Hospital psychiatrist who also examined defendant, his intoxication, together with his limited intellectual functioning and personality disorder, resulted in an impairment of his ability, at the time of the offense, to conform his conduct with the requirements of the law.

Intoxication, even when voluntary, may constitute a valid defense to the charge of murder in the first degree. *See, e.g., State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983) (if defendant was intoxicated to a degree precluding premeditation and deliberation, he cannot be found guilty of murder in the first degree); *State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978) (defendant cannot be convicted of murder in the first degree if intoxicated to a degree sufficient to preclude forming a specific intent to kill).

This Court has held that "[a] juror who reveals that he is unable to accept a particular defense or penalty recognized by law is prejudiced to such an extent that he can no longer be considered competent." *State v. Leonard*, 296 N.C. 58, 62-63, 248 S.E. 2d 853, 855 (1978). Thus, permitting defendant to be tried for his life by a jury whose members had expressly committed themselves to disregard what proved to be substantial evidence that defendant was highly intoxicated at the time the fatal shot was fired infringed upon his fundamental right to be tried by an impartial jury.

As stated by the Supreme Court of Mississippi in *Stringer v. State*, 500 So. 2d 929 (1986):

> It is improper influence to put the jury in a 'box' by *voir dire* tactics which extract a promise, prior to trial, to ignore evidence favorable to the defendant. This promise or pledge prevents the jurors from considering all facts relevant to the verdict. The jurors are then called upon during closing arguments to fulfill that promise, and the effect—whether calculated or not—is to shame or coerce the jury into rejecting factors which would tend to mitigate against the death penalty.

Id., 500 So. 2d at 936-37.

For all of the reasons indicated herein, and for the reasons set forth in the dissenting opinion of Justice Martin, defendant should be given a new trial. Even if his conviction is upheld, he should be given a new sentencing hearing for the reasons stated in the dissenting opinion of the Chief Justice.

PROPORTIONALITY

Because I do not believe that defendant has received a fair trial free of prejudicial error, I would not reach the question of proportionality. However, since the majority reaches that question and finds that the death sentence is not disproportionate in this case, I write to express my disagreement with that conclusion also.

As the majority correctly states, in conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E. 2d 808, 829 (1985). There are four cases in the proportionality pool in which defendants killed law enforcement officers engaged in the performance of their official duties. Those cases are: *State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205 (1985), *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984); *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983), and *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981).

In *Payne*, defendant murdered a detective who had earlier arrested him on a drug charge. He handcuffed the detective's hands behind his back and pushed him into a river to drown. The jury returned a verdict of life imprisonment. In *Hill*, a policeman chased and tackled the defendant who was suspected of having committed a felony. During the ensuing struggle, defendant managed to get possession of the officer's pistol and shot and killed him. This Court found the death sentence disproportionate and sentenced defendant to life imprisonment. In *Abdullah*, defendant conspired with others to commit an armed robbery and shot the policeman several times during the course of the robbery, killing him. The jury returned a verdict of life imprisonment. In *Hutchins*, the defendant shot and killed two officers and then shot and killed a third officer who was attempting to arrest him. This Court upheld the sentence of death.

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When considering the crime and the defendant and comparing this case with the crime and the defendants in the other four cases involving the killing of law enforcement officers, I find the instant case more like *Abdullah*, *Hill*, and *Payne* than *Hutchins*. Thus, I agree with defendant that to conclude that he deserves to die, when the defendants in *Abdullah*, *Payne*, and *Hill* were spared that ultimate penalty, would defeat the purpose of proportionality review mandated by the legislature, which, as this Court stated in *State v. Jackson*, 309 N.C. 26, 46, 305 S.E. 2d 703, 717 (1983), "is to serve as a check against the capricious or random imposition of the death penalty." Thus, were I to reach proportionality, I would find the death sentence in the instant case disproportionate as a matter of law and sentence defendant to life imprisonment.

Chief Justice EXUM joins in this dissenting opinion.

Justice MARTIN dissenting in part.

I respectfully dissent from the holding of the majority that defendant's inculpatory statements were admissible; otherwise, I concur in the majority opinion, including specifically, the resolution of the issue arising under *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988).

With respect to the confession issue, the majority approves the admission of inculpatory statements by a sixty-five-year-old black man with an I.Q. of 74, blind in one eye, his other eye injured and bandaged so that he could not see, wounded and treated at the hospital, with a blood alcohol level of .264, afraid for his life, travelling in a van with officers for over two hours from Anson County to Raleigh, at times cold and thirsty, suffering from his wounds, and being, in the opinion of Dr. Rollins, incapable of appreciating the waiver of his constitutional rights. In this I cannot concur.

Perhaps by finecombing the record, as the majority has done, some evidence can be found which when isolated may support some of the trial court's findings of fact. The true test of the voluntariness of a confession, though, is found in the totality of the circumstances. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). Once it is established that the procedural requirements of

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), have been met, the determination of whether defendant's confession was knowingly and voluntarily made must be found from considering all of the circumstances of the case. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984).

What were the totality of the circumstances when defendant confessed?

THE ENVIRONMENT

First, it is to be noted that defendant was in a sheriff's van, being transported to Raleigh "for safekeeping" without the issuance of a judicial order authorizing the transfer. N.C.G.S. § 15A-521 (1983). Although an officer testified that "warrants" were served on defendant while in the van, no warrants appear in the record on appeal. The crime occurred and defendant was taken to Raleigh on 22 December 1984. The order of arrest in the record on appeal was served on defendant on 24 January 1985. So we have a defendant being unlawfully transported in a van through the black of night by hostile officers, alone, with no way to contact anyone outside the van as a witness or otherwise.

The trial court failed to consider the actions of the officers in removing defendant from the hospital and interrogating him in the isolated and coercive environment of a moving police van. Compelling a suspect to travel during interrogation, or interrogating a suspect during travel, is a factor which suggests involuntariness. *Clewis v. Texas*, 386 U.S. 707, 18 L.Ed. 2d 423 (1967). Here, the defendant was completely incommunicado and isolated from the police station or the jail. This was obviously done for the purpose of interrogating the defendant in an environment conducive to producing inculpatory statements. These are factors indicating involuntariness. This is particularly true when the defendant is susceptible to coercion. *Vernon v. Alabama*, 313 U.S. 547, 85 L.Ed. 1513 (1941) (per curiam); *White v. Texas*, 310 U.S. 530, 84 L.Ed. 1342 (1940). The officers were fully aware that the defendant had been badly wounded by gunfire shortly before the interrogation. They knew that defendant had been extremely intoxicated when he was brought to the hospital. They knew he was blind and in a severely weakened physical condition. Having this knowledge, the officers took the defendant from the hospital on a gurney, placed him into a police van coutaining three of-

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ficers, and commenced the nighttime ride from Wadesboro to Raleigh. In so doing, the officers deliberately cut defendant off from the outside world, leaving him in a position of extreme vulnerability to their interrogation. It is difficult to conceive of a fact situation more conducive to overbearing a defendant's will than the one existing in this case.

THE DEFENDANT

The defendant at the time of this offense was sixty-five years of age. He was suffering from serious gunshot wounds sustained in the preceding hours. He was blind, mentally disordered, had a borderline intellect, and was under the influence of alcohol. He expressed to the officers that he was afraid for his life at the time they were interrogating him in the police van. Dr. Perry, an emergency room physician, testified that defendant was brought to the hospital by ambulance around 6:30 p.m. Dr. Perry treated him in the trauma facility for two serious gunshot wounds, one a laceration through the forehead down to the skull, the other a puncture wound to the buttocks. The head wound was about six centimeters long and very deep, the bullet passing through the entire thickness of the forehead down to the skull. The wound to the buttocks was a through-and-through injury, about ten to twelve centimeters in length. Defendant was semiconscious at the time of his arrival and unable to respond coherently to the doctor's attempts to communicate with him. Such wounds are normally very painful, but defendant did not indicate that he was suffering the normal degree of pain, which the doctor attributed to the degree of defendant's alcoholic intoxication, which was a blood alcohol level of .264. Dr. Perry treated defendant's wounds for some forty minutes, closing them with sutures. They were heavily bandaged, completely closing the defendant's good eye, he being blind in the other eye. During the treatment defendant was administered intravenous fluids for the purpose of elevating his blood pressure, according to Dr. Perry.

Dr. Rollins is an expert medical witness, a forensic psychiatrist, and employed by the state. He examined the defendant several times with respect to this incident. He testified that defendant had multiple personality disorders, including paranoid and delusional thinking, with impaired judgment and perception. In 1980 he had scored 89 on an I.Q. examination, but later, at the

time of this event, his I.Q. test score had deteriorated to 74, which placed defendant in the borderline range of intellectual functioning. Dr. Rollins further testified that defendant was substantially intoxicated at the time of the interrogation and that this condition would exacerbate defendant's mental disabilities. He expressly testified that defendant, because of his mental disorders and his physical condition at the time, was incapable of knowingly and voluntarily waiving his constitutional rights at the time that he was interrogated by the officers.

The trial judge failed to make any findings as to the defendant's mental condition and completely overlooked the deteriorating mental and psychotic condition of the defendant which had occurred over the past five years as evidenced by the decline in his I.Q. scores. The court's determination that defendant had an I.Q. at the time of the interrogation between 74 and 89 is unsupported by the evidence. The only relevant evidence indicates that at the time of the interrogation defendant's I.Q. was 74, having deteriorated from the 89 that he had scored some five years previously. Mental handicaps which make a defendant particularly susceptible to the influence of others are an important factor in weighing voluntariness. *Jurek v. Estelle*, 593 F. 2d 672 (5th Cir. 1979). Further, a defendant's physical condition is an important factor in determining whether a confession is voluntary. *Cooper v. Griffin*, 455 F. 2d 1142 (5th Cir. 1972). *See also State v. Dailey*, 351 S.E. 2d 431 (W. Va. 1986).

In *Colorado v. Connelly*, 479 U.S. ---, 93 L.Ed. 2d 473 (1986), the United States Supreme Court held that ordinarily a defendant's mental impairment, standing alone, is not a sufficient basis for ruling a confession involuntary. However, in this case, we have not only the defective mental condition of the defendant, but also the coercive environment in which the officers placed the defendant, together with his impaired physical condition. These factors considered together are sufficient to show involuntariness.

THE INTERROGATION

After placing the defendant in the police van and beginning the journey to Raleigh, the officers informed the defendant of his rights as they were leaving the Wadesboro city limits. To this the defendant responded: "I was tried for my life and I understand all this stuff. I was tried for my life back in 1951." Interestingly,

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Miranda warnings were not required until 1966, fifteen years *after* defendant's earlier court experience. The officers testified that after being read his rights defendant said "[h]e did understand but he did not want to sign anything because he couldn't see." From this testimony, the trial court found that the defendant made an "express" statement that he did not want an attorney present. A fair reading of this testimony, however, only shows that the defendant responded that he understood his rights, but he did not want to sign anything because he could not see. There is no indication in this testimony that the defendant expressly waived the presence of counsel. He did not go the additional step and say: "I don't want a lawyer now." Of course, it is not essential that there be an express waiver by defendant. However, the court must presume that the defendant did not waive his rights. *State v. Connley*, 297 N.C. 584, 256 S.E. 2d 234, *cert. denied*, 444 U.S. 954, 62 L.Ed. 2d 327 (1979). The trial court's finding of an express waiver is unsupported by the evidence. Nowhere does the trial court find an implied waiver under all the circumstances of the case, and none can be so found. For this reason, I think the trial judge's order is fatally flawed.

The interrogation continued for some two hours, and during this time the officers obtained admissions from defendant that proved to be critical to the state's case. During the interrogation, the defendant stated, "I'm fearing for my life now." Although the officers testified that they assured defendant that he had nothing to fear, the defendant could not see the officers and had no way of knowing what they were doing in the van. He also had no way of knowing where they were taking him, even though one officer said he was being taken to Raleigh for safekeeping. Certainly, in view of the environment in which he was situated and his physical and mental condition, it is reasonable that the defendant was fearful for his life at the time that he was being interrogated. That fact alone is sufficient to refute any finding of voluntariness.

During the interrogation the defendant was suffering from his painful bullet wounds. There is no evidence that he had been given any sedatives or painkillers to alleviate his suffering. The record shows that defendant voiced numerous complaints during the interrogation and that he was experiencing physical discomfort.

At one point defendant told the officers that he was tired and wanted to stop the interrogation. He also complained at that time that he was cold, and the heat in the van was turned up and he was given a sheet to cover himself. After a short period, one of the officers asked defendant if he wanted to talk. Defendant stated that he did not want to talk to Officer Jackson. One of the other officers asked defendant if he would talk with him, and defendant agreed. This procedure by the officers violates the ruling of *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L.Ed. 2d 984 (1981). In *Edwards*, the Court held that when a suspect indicates his desire to stop the interrogation, the officers must terminate it and the interrogation cannot be resumed until initiated by the suspect. Here, the evidence clearly shows that defendant desired to terminate the interrogation. He said that he was tired and wanted to stop. The officers stopped for a short time and then, without any initiation of the interrogation by the defendant, the officers resumed the process of examining the defendant. For this reason, the confession was not admissible.

Thus, I find defendant's statement to be involuntary and the result of his being unlawfully placed in a coercive environment while severely handicapped, both mentally and physically, and interrogated in violation of *Edwards v. Arizona* while fearful for his life. Defendant is entitled to a new trial.

Chief Justice EXUM and Justice FRYE join in this dissenting opinion.

STATE OF NORTH CAROLINA v. ELTON OZELL McLAUGHLIN

No. 627A84

(Filed 7 September 1988)

1. Constitutional Law § 28— complicated case—denial of motion to have trial judge retain jurisdiction over all matters—no due process violation

The trial court did not err in a prosecution for three first degree murders by denying defendant's motion to have the trial judge retain jurisdiction over all matters pertaining to the trial on the grounds that this was a complicated case and that due process therefore required one judge to hear all pretrial mo-

APPENDIX "B"

JUDGE FREEMAN'S CHARGE TO THE JURY:

Members of the jury, having found the defendant guilty of murder in the first degree, it is now your duty to decide or to recommendto the Court whether the defendant should be sentenced to death or to life imprisonment. Your recommendation will be binding upon the Court. If you unanimously recommend that the defendant be sentenced to death, the Court will be required to imoose a sentence of death. If you unanimously recommend a sentence of life imprisonment, the Court will be required to impose a sentence of imprisonment in the State's prison for life.

All of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing proceeding any evidence which was submitted during the guilt phase of this case. All of the evidence which you hear in both phases of the case is competent for your consideration in recommending punishment. EXCEPTION NO. 71 he objection STATED AT TRIAL

It is now your duty to decide from all the evidence presented in both phases what the facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or as you might like

it to be. This is important because justice requires that everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner, and have the same law applied to him.

You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs. As applied to this trial, these tests may include: the opportunity of the witness to see, hear, know or remember the facts or occurrences about which he testified; the manner and appearance of the witness; any interest, bias, or prejudice the witness may have; the apparent understanding and fairness of the witness, whether his testimony is reasonable; and whether his testimony is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable evidence in the case.

I charge that for you to recommend that the defendant be sentenced to death, the State must prove three things beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or the lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things.

First, that one or more aggravating circumstances existed. Second, that any mitigating circumstances you have found are insufficient to outweigh any aggravating circumstances you have found. Third, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances you have found. EXCEPTION NO. 7

...3 CORRECTION STATED AT TRIAL

If you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that the defendant be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to recommend that the defendant be sentenced to life imprisonment.

When you retire to deliberate your recommendation

as to punishment, you will take with you a form entitled, "Issues and Recommendation as to Punishment." This form contains a written list of four issues relating to aggravating and mitigating circumstances. I will now take up these four issues with you in greater detail, one by one. To enable you to follow me more easily, I'm going to have the bailiff give each of you a copy of the form entitled "Issues and Recommendation as to Punishment," which you will take with you when you retire to deliberate. Do not read ahead on this form, but if you will just refer to it as I instruct you on the law. So, Sheriff, if you will step up here please, I believe we have thirteen copies of this. Did everybody get a copy? The alternate has one too I believe.

All right. Issue Number One is, "Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?" There are two possible aggravating circumstances that are listed on the form, and you should consider each of them before answering Issue Number One.

The State of North Carolina must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance, and, before you may find any aggravating circumstance, you must agree unanimously

that it has been so proven. An aggravating circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law. Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as aggravating circumstances. Under the evidence in this case two possible aggravating circumstances may be considered.

The following are the aggravating circumstances which might be applicable to this case.

The first is, "Had Dock McCoy been previously convicted of a felony involving the use of violence to the person?" And I instruct you that second degree murder is by definition a felony involving the use of violence to the person. A person has been previously convicted if he has been convicted and not merely charged, and if his conviction is based on conduct which occurred before the events out of which this murder arose. If you find from the evidence beyond a reasonable doubt that on or about 1952 Dock McCoy -- (STRIKE THAT) -- If you find that on or about December the 22nd, 1984, that Dock McCoy had been convicted of second degree murder, and that he, Dock McCoy, killed Deputy Kress Horne, after he had committed the second degree murder,

EXCEPTION NO. 79 NO OBJECTION STATED AT TRIAL

you would find this aggravating circumstance, and would so indicate by having your foreman write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreman write, "No." in that space.

EXCEPTION NO. 79-A

Now, the second possible aggravating circumstance is, "Was this murder committed against a deputy sheriff while engaged in the performance of his official duties? A murder is so committed if, at the time the defendant kills the victim, the victim is a deputy sheriff and is at that time engaged in the performance of an official duty. An official duty is anything which is necessary for a deputy sheriff to do in his capacity as a deputy sheriff. If you find from the evidence beyond a reasonable doubt that when Dock McCoy killed Deputy Kress Horne, that Kress Horne was a deputy sheriff and at that time was answering a disturbance call pursuant to a dispatch to the Sheriff's Department and that this was among the official duties as a deputy sheriff, you would find this aggravating circumstance, and would so indicate by having your foreman write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a

EXCEPTION NO. 80 NO OBJECTION STATED AT TRIAL

NO OBJECTION STATED AT TRIAL EXCEPTION NO. 81

reasonable doubt as to one or more of these things, you will not find this aggravating circumstance,and will so indicate by having your foreman write, "No," in that space.

Now, if you unanimously find from the evidence beyond a reasonable doubt that one or more of these aggravating circumstances existed, and have so indicated by writing, "Yes," in the space after one or more of them on the "Issues and Recommendation" form, you would answer Issue One, "Yes." If you do not unanimously find from the evidence and beyond a reasonable doubt that at least one of these aggravating circumstances existed, and if you have so indicated by writing, "No," in the space after both of them on that form, you would answer Issue Number One, "No." If you answer Issue Number One, "No," you would skip Issues Two, Three and Four and you must recommend that the defendant be sentenced to life imprisonment. If you answer Issue Number One, "Yes," then you would consider Issue Number Two.

Issue Number Two is, "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" Eight possible mitigating circumstances are listed on this form, and you should consider each of them before answering Issue Number Two.

A mitigating circumstance is a fact or group of facts, which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders. Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence which you deem to have mitigating value.

Now, the defendant, Dock McCoy has the burden of persuading you that a given mitigating circumstance exist. The existence of any mitigating circumstance must be established by a preponderance of the evidence. That is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exist. You would find that circumstance if the evidence satisfies you that a mitigating circumstance exist. If not, you would not find it. But in either event, you would move on to consider the other mitigating circumstances and continue

EXCEPTION NO. ___ NO OBJECTION STATED AT TRIAL

in a like manner until you have considered all of the mitigating circumstances listed on the form and any others that you deem to have mitigating value.

It is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

Number one, consider whether this murder was committed while Dock McCoy was under the influence of mental or emotional disturbance. A defendant is under such influence if he is in any way affected or influenced by a mental or emotional disturbance at the time he kills. Being under the influence of mental or emotional disturbance is similar but not the same as being in the heat of passion upon adequate provocation. A person may be under the influence of mental or emotional disturbance even if he had no adequate provocation and even if his disturbance was not so strong as to constitute heat of passion or preclude deliberation. For this mitigating circumstance to exist, it is enough that the defendant's mind or emotions were disturbed from any cause and that he was under the influence of the disturbance when he killed Kress Horne. You would find this mitigating circumstance if you find that the defendant suffered from personality and adjustment disorders, and that as a result Dock McCoy was under the influence of

mental or emotional disturbance when he killed Kress Horne and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the second mitigating circumstance that you should consider is whether the capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know that he is -- or to know that what he is doing at a given time is killing or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing, or how wrong it is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished. Finally, this mitigating circumstance would exist, even if the defendant did

appreciate the criminality of his conduct, if his capacity to conform to the law is impaired, since a person may appreciate that the killing is wrong and still lack the capacity to refrain from doing it. Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of intoxication, or mild mental retardation, or personality disorder, or adjustment disorder, is lessened or diminished because of such intoxication, or mental or emotional disorder, or borderline intelligence. You would find this mitigating circumstance if you find that Dock McCoy drunk a quantity of whiskey during the hours of the killing or that he suffered from adjustment, or personality disorder, or that he had borderline mental deficiency, and that this impaired his ability -- (STRIKE THAT) -- and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the third possible mitigating circumstance

that you should consider is whether the age of Dock McCoy at the time of this murder is a mitigating factor. The mitigating effect of the age of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence, and would so indicate it by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the fourth mitigating circumstance that you should consider is that whether for several decades Dock McCoy has exhibited signs of mental or emotional disturbance or defect that went untreated. Now, the mitigating effect of this circumstance is for you to determine from all of the facts and circumstances which you find from the evidence and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you would so indicate by having your foreman write, "No," in that space.

Now, the fifth mitigating circumstance that you

should consider is whether Dock McCoy has borderline intellectual functioning with a I.Q. test score of 74. And the mitigating effect of the defendant's I.Q. is for you to determine from all of the facts and circumstances which you find from the evidence and which -- and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the sixth, consider whether Dock McCoy's mental and emotional disturbances -- whether his mental and emotional disturbance is aggravated by his poor physical health. And the mitigating effect of the aggravation of his poor mental health is for you to determine from all of the facts and circumstances which you find from the evidence, and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issue and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you would so indicate it by having your foreman write, "No," in that space.

Now, number seven, you should consider whether

Dock McCoy's ability to remember the events of December the 22nd, 1984, is actually impaired. The mitigating effect of the impaired memory of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write, "No," in that space.

Now, number eight, you should consider whether Dock -- Number eight, you should finally consider whether any -- consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value. If you do unanimously so find by a preponderance of the evidence, you will so indicate by having your foreman write, "Yes," in the space after the mitigating circumstance on the "Issue and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write, "No," in that space. If you unanimously find by a preponderance of the evidence one or more mitigating circumstances and have so indicated by writing, "Yes," in the space after one or more of them

on the "Issues and Recommendation" form, you would answer Issue Number Two,"Yes." If you do not unanimously find by a preponderance of the evidence that at least one of these mitigating circumstances existed, and if you have so indicated by writing, "No," in the space after every one of them on that form, you would answer Issue Number Two, "No." If you answer Issue Number Two, "Yes," you must consider Issue Number Three. If you answer Issue Number Two, "No," you will not answer Issue Three. Instead, skip Issue Three and answer Issue Four.

Now, Issue Number Four -- excuse me, Issue Number Three is, "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?" If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance, and then weigh the aggravating

EXCEPTION NO. 83 NO OBJECTION STATED AT TRIAL

circumstances, so valued, against the mitigating circumstances, so valued, and finally determine whether the mitigating circumstances outweigh the aggravating circumstances.

EXCEPTION NO. 84 NO OBJECTION STATED AT TRIAL

If you unanimously find, beyond a reasonable doubt, that the mitigating circumstances found by you are insufficient to outweigh the aggravating circumstances found by you, you would answer Issue Three, "Yes." If you do not so find or have a reasonable doubt as to whether they do, you would answer Issue Three, "No." If you answer Issue Three, "No," it will be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three, "Yes," you must consider then Issue Number Four.

Issue Four is, "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you. In deciding this issue you're not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable

doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue, "Yes." In so doing, you're not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of the other kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasion -- persuasiveness of the existing aggravating and mitigating circumstances in making this determination.

NO OBJECTION STATED AT TRIAL BY ... NO. 86

You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared to the totality of the mitigating circumstances found by you. After so doing, if you're satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, it would be your duty to answer the issue, "Yes." If you are not so satisfied or have a reasonable doubt, it will be your duty to answer the issue, "No." In the event you do not find the existence of any mitigating circumstances, you must still answer this issue. And in such case you must

EXCEPTION NO. 3 NO OBJECTION STATED AT TRIAL

determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, of significance as to be sufficiently substantial to call for the imposition of the death penalty. Substantial circumstances may be contrasted with circumstances that are flimsy, abstract, imaginary, accepted or negligent. Substantial means having substance or weight, important, significant or momentous.

Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence, beyond a reasonable doubt, the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer Issue Four, "Yes," you must agree unanimously that they are. If you answer Issue Four, "No," you must recommend that the defendant be sentenced to life imprisonment. If you answer Issue Four, "Yes," it would be your duty to recommend that the defendant be sentenced to death.

EXCEPTION NO. 87 NO OBJECTION STATED AT TRIAL

Now, members of the jury, you have heard the evidence and the arguments of counsel for both the State and for the defendant. I did not summarize the evidence,

but it is your duty to remember all of the evidence whether it's been called to your attention or not, and if your recollection of the evidence differs from mine or that of the District Attorney, or that of the defense attorney, you are to rely solely upon your own recollection of the evidence in your deliberations. I did not review the contentions of the attorneys in their speeches to you, but it is your duty not only to consider all the evidence, but also to consider all the arguments, the contentions and positions argued by the State's attorney and the defendant's attorney in their speeches to you, and any other contention that arises from the evidence, and to weigh them in the light of your common sense, and to make your recommendation as to punishment.

Now, the law, as indeed it should, requires the presiding judge to be impartial. You are not to draw any inference from any ruling that I have made, or any inflection in my voice or expression on my face, or any question I may have asked a witness, or anything else that I may have said or done during this trial, that I have an opinion or have intimated an opinion, as to whether any part of the evidence should be believed or disbelieved, as to whether any aggravating or mitigating circumstance has been proved or disproved, or as to what your recommendation ought to be. It is your exclusive province

to find the true facts of the case and to make a recommendation reflecting the truth as you find it.

Now, when you're ready to make your recommendation, have your foreman write in your recommendation as directed on the "Issues and Recommendation" form.

At this time I will ask all of you just to pass those forms back to the bailiff. We will take all of those up and then I'll give you one.

Have you got all thirteen?

THE BAILIFF: Yes, sir.

THE COURT: Everybody gave them to the Sheriff, I assume? All right, at this time I will excuse the alternate juror. You can just sit right there until they go back. Sir, when they go back to deliberate, you are excused and I thank you for serving. You're certainly welcome to wait if you want to, have a seat out there, and you can wait and see what your fellow jurors do, or if you would like to go home, you're excused to go home.

Now the rest of you, if you will retire to the jury room. You should first select one of your members to serve as foreman to lead you in your deliberations. Do not begin your deliberations until you receive the written form from the bailiff, and you will proceed immediately with the selection of your foreman. And then after you receive the written form, proceed with your

deliberations. When you've reached a unanimous decision on the "Issues and Recommendation" and are ready to pronounce it, and your foreman has written the answers on the form, have your foreman sign and date it, notify the bailiff by knocking on the door of the jury room, and you will be returned to the courtroom to pronounce your answers to the "Issues and Recommendation". If you will step back to that room now and proceed with the selection of a foreman.

(The jury leaves the courtroom at approximately 3:40 p.m.)

THE COURT: All right. Before I send the "Issues and Recommendation" form to the jury and let them begin their deliberations I'll consider any request for corrections or additional matters that anyone feels necessary or appropriate to submit a proper charge to the jury. Any for the defense?

MR. STOKES: No, sir.

THE COURT: Any for the State?

MS. WALLACE: No, sir.

THE COURT: All right. Mr. Sheriff, if you will give them that form, please.

(The jury returns to the courtroom at approximately 5:23 p.m.)

THE COURT: Who is the foreman?

THE FOREMAN: (Walter Wild) - I am.

THE COURT: Do y'all have a question, sir? Is that it?

THE FOREMAN: Yes, sir. We're a little confused on Issue Two, Question Two. Is it a two-part question? Can you fully explain it?

THE COURT: You can have a seat. Are you talking about the mitigating circumstance which reads, whether the capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Is that what you're talking about? You question is whether that's a two-part question?

THE FOREMAN: Is it a two-part question or can you explain it? The reason we think it's possibly a two-part question is because of the word "or".

THE COURT: Let me repeat this to you and see if this clears it up. On this question, you are to consider whether the capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know that what he is doing at a given time is killing

or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing, or how wrong it is. Further, for this mitigating circumstances to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished. Finally, this mitigating circumstance would exist, even if the defendant did appreciate the criminality of his conduct, if his capacity to conform to the law is impaired, since a person may appreciate that the killing is wrong and still lack the capacity to refrain from doing it. Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of intoxication, or mental retardation, or personality disorder, or behavioral deficiency is lessened or diminished because of such impairment. You would find this mitigating factor if you find that Dock McCoy consumed a large quantity of whiskey during the hours before the killing or that he suffered from mild mental retardation, or he suffered from the emotional or mental disturbances, or defiencies, and that this impaired his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements

of the law, and you would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write, "No," in that space. Now, do you think that answers your question?

THE FOREMAN: Yes.

THE COURT: All right. If you will step back there and resume your deliberations.

(The jury retires to the jury room at approximately 5:30 p.m.)

THE COURT: Any objection to that additional instruction or any request for anything further or corrections?

MR. STOKES: No, sir.

THE COURT: Let the record show there's none from the defendant and none from the State. We will stand at ease for awhile.

(The jury returns to the courtroom at approximately 6:17 p.m.)

THE COURT: All right. Mr. Foreman, I certainly don't want to know how your deliberations are going or what your count is, or anything of that nature, but it is 6:15. Do y'all feel like that if you were

allowed to deliberate a little bit longer today you could reach a verdict or had you rather come back tomorrow.

THE FOREMAN: I believe we can reach it today, Your Honor, in a reasonable amount of time.

THE COURT: You understand I'm certainly not rushing you. You have all day tomorrow and the next day if you need to take that much time. If you will step back there and resume your deliberations. If you come to the point where you think it's going to take a considerable more amount of time, you might knock on the door and tell the sheriff, and we will let you come back tomorrow. Step back there and resume your deliberations.

(The jury retires to the jury room at approximately 6:17 p.m. and returns to the courtroom at approximately 6:25 p.m.

THE COURT: Mr. Foreman, have you reached a verdict?

THE FOREMAN: No, sir. We would like to request one more day.

THE COURT: All right. Would you give that verdict sheet to the bailiff there and we will have that sealed and put in an envelope. Members of the jury, I am going to let you go home. Let me caution you again, as I've done a number of times, -- give it to the Clerk

there and if you will seal that in an envelope. Let me caution you, as I've done a number of times, it is extremely important. Do not talk about this case among yourselves, don't talk to anybody at home about it, don't talk to anybody or carry on any conversation at all with anybody involved in the case. Don't regard it on any news media and don't let anybody tell you what they might have heard or read about it, and don't make any independent study or investigation on your own. If anybody tries to talk with you about this case, just report that to the Court at your earliest convenience. Given the lateness of the hour, I might let you come in at ten o'clock in the morning. If you will be back in here at ten o'clock and just report right directly to that jury room, but do not begin your deliberations until all twelve jurors are present. Once all twelve of you are here, the sheriff will bring you that verdict sheet back to you and then you can begin your deliberations. So everybody will just remain seated until the jury can get out on the elevator.

RECESS.

DATE: August 8, 1985.

THE COURT: Why don't you bring all the jurors out here and let me make sure they are not deliberating any.

(The jury returns to the courtroom from the jury room.)

THE COURT: Good morning, members of the jury. I assume none of you heard anything or read anything about this case in any of the news media. I believe when you left yesterday your foreman had informed me that you have so far been unable to agree on a verdict. I want to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and to reconcile your differences if you can without the surrender of conscientious conviction, but no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict. I will let you resume your deliberations and see if you can reach a verdict. If y'all will step back there, please. Sheriff, if you will give that to the foreman, please.

EXCEPTION NO. 88 NO OBJECTION STATED AT TRIAL

(The jury retires to the jury room at approximately 10:12 a.m. and returns to the courtroom at approximately 11:15 a.m.)

THE COURT: Mr. Foreman, I believe you have reached a unanimous verdict, is that correct?

THE FOREMAN: Yes, Your Honor.

THE COURT: Would you hand that verdict sheet to the sheriff, please. Now, members of the jury, your

foreman has returned in open court a unanimous verdict, answering the first issue, "Yes," the second issue, "Yes," the third issue, "Yes," the fourth issue, "Yes," and recommended as its punishment that the defendant, Dock McCoy, be sentenced to death. Is that your verdict so say you all.

(All jurors indicate affirmatively.)

THE COURT: I assume you want to poll the jury.

MR. STOKES: I want to poll the jury.

THE COURT: Mr. Foreman, would you stand up, please? Mr. Foreman, you have returned a verdict of guilty -- well, you've returned a verdict of answering all four issues, "Yes," and recommending that the defendant be sentenced to death. Is this your verdict?

THE FOREMAN: (Walter H. Wild) - Yes, Your Honor.

THE COURT: Is this still your verdict?

THE FOREMAN: (Walter Wild) - Yes, Your Honor.

THE COURT: Thank you, sir. You may sit down. Juror Number One, Soyna Dial, would you stand up, please. Ma'am, your foreman has announced a verdict answering all four issues, "Yes," and recommending as its punishment death. Is this your verdict?

NORTH CARO[illegible] IN THE GEN[illegible]URT OF JUSTICE
STANLY COUNTY SUPERIOR[illegible]RT DIVISION
85-CRS-2617

STATE OF NORTH CAROLINA

VS.

DOCK McCOY, alias DOCK McCOY, JR., alias DOCK McKAY, alias PAUL McCOY,

Defendant.

ISSUES AND RECOMMENDATIO[illegible]

AS TO PUNISHMENT

ISSUES

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER YES.

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE ONE.

1. Had Dock McCoy been previously convicted of a felony involving the use of violence to the person?

ANSWER YES

2. Was this murder committed against a deputy sheriff while engaged in the performance of his official duties?

ANSWER YES

IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE, AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT", ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE, "YES" PROCEED TO ISSUE TWO.

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STANLY CO.
By: Nancy Scott

Issue Two:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER YES.

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. WRITE, "NO," IF YOU DO NOT UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE TWO.

1. This murder was committed while Dock McCoy was under the influence of mental or emotional disturbance.

ANSWER NO

2. The capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER YES.

3. The age of Dock McCoy at the time of this murder is a mitigating circumstance.

ANSWER NO

4. That for several decades Dock McCoy has exhibited signs of mental or emotional disturbance or defect that went untreated.

ANSWER NO

5. That Dock McCoy has borderline intellectual functioning with a IQ test score of 74.

ANSWER YES

A TRUE COPY
CLERK OF SUPERIOR COURT
STANLY CO.
By: Nancy Scott

6. That Dock McCoy's mental and emotional disturbance is aggravated by his poor physical health.

ANSWER NO.

7. Dock McCoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

ANSWER NO

8. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER NO

ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO, "YES." IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

Issue Three:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER YES.

IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR.

A TRUE COPY
CLERK OF SUPERIOR COURT
STANLY COUNTY
By: Nan Dalton

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER YES

IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE FOUR "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONMENT" OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Dock McCoy, be sentenced to DEATH.

This the 8 day of AUGUST, 1985.

Walter N. Wild (signature)
FOREMAN OF THE JURY

A TRUE COPY
CLERK OF SUPERIOR COURT
STANLY COUNTY
By: Nan Dalton

APPENDIX "C"

FILED
1988 OCT -6 AM 10 39
IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)
)
v.) No. 70A86 - Halifax
)
TIMOTHY LANIER ALLEN)

Appeal by defendant from a death sentence imposed by Pope, J., at the 4 November 1985 Criminal Session of Superior Court, Halifax County. The defendant's motion to bypass the Court of Appeals was allowed in those cases in which sentences of less than life were imposed. Heard in the Supreme Court 11 April 1988 and 22 August 1988.

The defendant was tried and convicted on three counts of felony possession of stolen property and one count of first degree murder for the killing of Raymond E. Worley a member of the North Carolina State Highway Patrol. Evidence presented at trial tended to show the following: During the early morning hours of 14 May 1985, Mr. Worley was patrolling I-95 in Halifax and Northampton counties. At approximately 5:11 a.m. Mr. Worley radioed his dispatcher that he was stopping two vans with Maryland license tags just north of Highway 561. No further radio communication from Mr. Worley was received. A short time later, pursuant to a request from the dispatcher at the Enfield Police Department, Don Davenport, a Division of Motor Vehicles enforcement officer, attempted to locate Mr. Worley. Davenport and Officer Cecil Austin drove approximately twelve miles up I-95 where they spotted Mr. Worley's car sitting on the right hand side of the road near highway marker 163. They also observed a

white van parked in front of the patrol car. As they pulled up behind the patrol car, they noticed Mr. Worley sitting in the driver's seat and that the rear window was slightly fogged. The officers got out of their vehicles and approached the patrol car at which time they saw that the driver's side window of the car was shattered, and that Mr. Worley's body was leaning to the right with his head tilted downward. Blood covered Worley's shirt and was spattered across the right side of his head as well as on his right arm and leg. The officers checked for a pulse but there was none. Rescue vehicles were called and arrived on the scene shortly thereafter at which time Mr. Worley was pronounced dead. A crime scene investigation was begun, with photographs and fingerprints being taken. In addition, investigators found a .22 caliber pistol as well as an identification card of a black male, Antonio Worrell.

An autopsy revealed that Mr. Worley had suffered three gunshot wounds. One shot entered behind the right ear and traveled through the neck, finally lodging in the left back behind the armpit. Another bullet entered the right shoulder and lodged near the right base of the neck. A third bullet hit the middle finger of the left hand.

Dr. John Butts, Associate Chief Medical Examiner for Halifax County, testified that due to massive blood loss Mr. Worley probably lost consciousness within a minute and died three to four minutes after the shooting. Dr. Butts further testified that Mr. Worley's lungs were hyperinflated due to blood rushing into the airways, essentially drowning him in his own blood. The

bullets found in the body were those of a .38 caliber pistol, which were subsequently compared with the gun found on Alex Allen.

At approximately 6:02 a.m. on 14 May 1985, Sergeant Everett Horton, of the North Carolina State Highway Patrol, received a call about Mr. Worley. He immediately began organizing a manhunt and alerted law enforcement officials from the surrounding counties.

The authorities subsequently received a report of an abandoned black van near the intersection of Highway 903 and U.S. 301 and a man walking down U.S. 301 near where the van had been abandoned. Around 6:20 a.m., E. D. Marshman, a member of the Highway Patrol, left his home off Highway 301 and began listening to radio accounts of the murder. He then observed a man matching the description of the man seen leaving the van walking along the highway. Marshman pulled up behind the man, subsequently identified as co-defendant Alex Allen, and ordered him to lie on the ground where he handcuffed him and placed him in custody. A subsequent search of Alex Allen revealed a .38 caliber pistol.

Around 7:15 a.m. on 14 May 1985, law enforcement officers tracked a group of three men to an abandoned house where they were arrested and taken into custody. The three were subsequently identified as Antonio Worrell, Mack Greene, and the defendant, Timothy Allen.

The co-defendants were transported back to the Halifax County Sheriff's Department. After interrogating defendants Worrell, Greene, and Alex Allen, E. C. Warren, a detective with

the Halifax County Sheriff's Department, began interrogating the defendant, Timothy Lanier Allen. At 1:50 p.m., the defendant was brought into an interview room where his Miranda rights were read to him, after which a waiver was obtained and interrogation begun. The defendant ultimately confessed to the murder.

In his confession, the defendant stated that on 11 May 1985 he left Washington, D.C. with Alex Allen, Antonio Worrell and Mack Greene in a black van stolen in Maryland. They traveled to Wallace, North Carolina, where they stayed with friends until around midnight on 13 May 1985. At that time they made plans to return to Washington, D.C. On the way they broke into a store located near Ivanhoe on N.C. 421 in Pender County, stealing beer, cigarettes and .22 and .38 caliber pistols. The defendant kept the .38 pistol and gave the .22 pistol to co-defendant Worrell and they continued their trip, stopping again along the road to steal a white van from a car lot. The defendant and Alex Allen got into the white van and followed Worrell and Greene in the black van.

As the group proceeded toward Washington, a patrol car pulled around the van driven by the defendant and stopped the van driven by Worrell. At that time the defendant pulled his van in behind the patrol car and parked on the shoulder of the highway. The defendant stated that he observed Mr. Worley get out of the patrol car, speak to Worrell, and then Worrell follow the trooper back to the patrol car. Mr. Worley then motioned for the defendant to get out of the van and come to the patrol vehicle. As the defendant approached the car, Mr. Worley reached

over to unlock the door. At that time, the defendant fired at least twice at Mr. Worley. At that point, all the co-defendants fled the scene in the black van and were subsequently arrested after hiding near an abandoned house.

After giving his statement, the defendant read the written version and signed the statement as being the truth to the best of his knowledge and belief. This statement was introduced by the State and read into evidence at trial.

At the close of the State's evidence, the defendant took the stand and denied shooting Mr. Worley, stating instead that following a meeting at the patrol car between himself, Worrell and Mr. Worley, he returned to the black van to get his license when he heard shots fired. After Mr. Worley was shot, the defendant and his friends drove off.

The jury found the defendant guilty of first degree murder and three counts of felonious possession of stolen property. After a sentencing hearing the jury recommended the death penalty which was imposed. The defendant appealed.

LACY H. THORNBURG, Attorney General, by ISAAC T. AVERY, III, Special Deputy Attorney General, H. JULIAN PHILPOTT, JR., Associate Attorney General, JAMES J. COMAN, Senior Deputy Attorney General, WILLIAM N. FARRELL, JR., Special Deputy Attorney General, and JOAN H. BYERS, Special Deputy Attorney General, for the State.

ANN PETERSON and GEOFFREY C. MANGUM, for defendant appellant.

E. ANN CHRISTIAN and ROBERT E. ZAYTOUN, for North Carolina Academy of Trial Lawyers, amicus curiae.

JOHN A. DUSENBURY, JR., for North Carolina Association of Black Lawyers, amicus curiae.

WEBB, Justice.

By his first assignment of error the defendant contends that the trial court erred in refusing to grant his motion to suppress his confession made by him on the day of his arrest. The defendant advances three different arguments as to why his confession should have been suppressed. He says first, pursuant to Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, reh. denied, 452 U.S. 973, 69 L.Ed.2d 986 (1981), his in-custody statement should have been suppressed due to a failure to stop interrogating him when he invoked his right to counsel. He also says he was not taken before a magistrate without unnecessary delay as required by N.C.G.S. § 15A-501(2). The third reason the defendant advances as to why his confession should have been suppressed is that considering the totality of the circumstances the State did not show the confession was voluntary.

The defendant made a motion to suppress his confession and a hearing was had before trial. There was testimony at this hearing by William A. Thompson, a special agent of the State Bureau of Investigation that he and E. C. Warren, a detective with the Halifax County Sheriff's Department, questioned the defendant in the interview room at the Sheriff's Department offices. The interview occurred at approximately 1:50 p.m. on 14 May 1985. Mr. Thompson testified that Mr. Warren read the defendant his constitutional rights to remain silent and to have an attorney. The defendant signed a written waiver of his constitutional rights and Mr. Warren confronted the defendant

with the evidence against him and attempted to interrogate him as to his part in the incident of that day. The defendant did not respond to Mr. Warren's questions until he was told of a statement by Antonio Worrell that the defendant had shot Mr. Worley. Mr. Thompson testified that at that point, "Timothy Allen stated something to the effect that if he made a statement that they would put him in the gas chamber -- or the electric chair, is what he said." At this point the defendant said he wanted to talk to a lawyer. The two officers stopped questioning the defendant and Mr. Warren told the defendant all he wanted was the truth, that the defendant would be returned to his jail cell and there would be no further interview with him. Mr. Warren also told the defendant that if he wished to have a further conversation he should call an officer. At that point Mr. Thompson suggested that if the defendant called for an officer he should ask for Mr. Warren. At this point the defendant said, "okay." The defendant then said, "I want to talk to you now, man." Mr. Warren then took the defendant's statement in which the defendant confessed to shooting Mr. Worley.

The court found facts consistent with the above evidence and concluded the defendant initiated the contact with the officers that led to his confession, and that he knowingly, voluntarily and intelligently waived his right to remain silent and his right to counsel. The court ordered the confession admitted into evidence. The court's findings of fact are supported by the evidence and the findings of fact support the conclusions. We will not disturb them.

In regard to the defendant's contention that the officers continued to interrogate him after he told them he wanted a lawyer, it is said in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378:

> [A]n accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. (Emphasis added.)

Id. at 484-485, 68 L.Ed.2d at 386. The defendant contends he did not initiate further communications after he asked for an attorney because the officers did not stop the interrogation. He says that Mr. Warren's statement that all he wanted was the truth, that the defendant would be returned to his cell and would have to contact the officers if he wanted to make a statement was a continuation of the interrogation. He also says, that when his request for counsel was met by "handcuffs and incommunicado incarceration, while ... inviting his last chance to tell his side of the story" he was cajoled into confessing.

We do not interpret the officers' statements as does the defendant. After he requested counsel the officers did not ask any further questions of the defendant. They told him of their availability if he changed his mind. We can find no coercion or pressure, nor was there any "functional equivalent" to questioning. See Rhode Island v. Innis, 446 U.S. 291, 64 L.Ed.2d 297 (1980). The fact that the defendant was to be handcuffed to be returned to his jail cell is not a continuation of the interrogation. We believe the facts found by the superior

court support the conclusion that the defendant of his own volition initiated the continuation of the interrogation.

For other cases in which we have held the defendant initiated contact with the officers after interrogation had been stopped, see State v. Nations, 319 N.C. 329, 354 S.E.2d 516 (1987); State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986); State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985); State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

The defendant argues that even if he initiated further communications with the officers the totality of circumstances surrounding the interrogation shows the waiver of his right to counsel and his other constitutional rights was coerced and without the requisite level of comprehension. He says this is so because of the massive show of force at the time of his capture, the fact that he was kept handcuffed in an isolated cell for several hours before interrogation, the jail was crowded with law enforcement officers, the failure of the officers to assist him when he requested counsel, the defendant's mental and physical condition at the time of his capture as a result of lack of sleep, being pursued by bloodhounds and helicopters for two or three hours and illness from drug withdrawal.

None of these factors necessarily prevented the defendant's waiver of his rights from being the product of a free and deliberate choice rather than from intimidation, coercion or deception. Nor did they necessarily prevent the defendant from waiving these rights with a full awareness both of the nature of the rights being abandoned and the consequences of the decision

to abandon them. The superior court so found and we are bound by its findings. Moran v. Burbine, 475 U.S. 412, 89 L.Ed.2d 410 (1986).

Finally the defendant argues there was an unnecessary delay in violation of N.C.G.S. § 15A-501 before taking him before a magistrate. In State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978), we held that a confession must be suppressed if there is a violation of N.C.G.S. § 15A-501 only if the confession was obtained as a result of the violation. In Richardson the delay in taking the defendant before a magistrate to advise him of his rights was substantially the same as in this case. We held this did not show the confession was obtained as a result of a violation of N.C.G.S. § 15A-501. There is nothing in the record in this case that shows the defendant's confession resulted from any delay in taking him before a magistrate.

The defendant's first assignment of error is overruled.

In his second assignment of error the defendant contends he must have a new trial pursuant to Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69 (1986), because he was denied equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 26 of the Constitution of North Carolina. In State v. Jackson, 322 N.C. 251, 368 S.E.2d 838 (1988), we faced a Batson question and said the following:

> In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712,, 90 L.Ed.2d 69, the United States Supreme Court overruled Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), and held a prima facie case of purposeful discrimination in the selection of

> a petit jury may be established on evidence concerning the prosecutor's exercise of peremptory challenges at the trial. In order to establish such a prima facie case the defendant must be a member of a cognizable racial group and he must show the prosecutor has used peremptory challenges to remove from the jury members of the defendant's race. The trial court must consider this fact as well as all relevant circumstances in determining whether a prima facie case of discrimination has been created. When the trial court determines that a prima facie case has been made, the prosecution must articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group. The prosecutor's explanation need not rise to the level of justifying a challenge for cause. At this point the trial court must determine if the defendant has established purposeful discrimination. Since the trial court's findings will depend on credibility, a reviewing court should give those findings great deference. Batson, 476 U.S. 98, n. 21, 106 S.Ct. 1724, 90 L.Ed.2d 89, n. 21.

Id. at 254-255, 368 S.E.2d at 839-40.

In this case the jury before which the defendant was tried consisted of seven black persons and five white persons. Of the seventeen black veniremen tendered to the State (including alternates), it accepted seven or forty-one percent. In State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987), we held that the defendant did not make a prima facie case of racially motivated peremptory challenges when the State peremptorily challenged three of five black veniremen tendered to it. In State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), we held an inference that racially motivated peremptory challenges did not arise when the State peremptorily challenged six of the twelve black jurors tendered. In that case the State peremptorily challenged five

white jurors. We hold pursuant to Abbott and Belton that the defendant has not made a prima facie showing of racially motivated peremptory challenges when the State accepted seven of the seventeen black veniremen tendered and the majority of the jury which tried the defendant was black.

In his third assignment of error the defendant contends it was error to excuse a juror for cause based on her opposition to the death penalty. Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, reh'g. denied, 393 U.S. 898, 21 L.Ed.2d 186 (1968), held that a venireman may be excused for cause if he is irrevocably committed before the trial begins to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings. During the examination of one of the jurors by the district attorney the following colloquy occurred:

> MR. BEARD: All right. And also because you are a nurse. Because of those things, it is your decision that you would not be able to recommend the death penalty in this particular case?
>
> MRS. ROOK: Yes, sir.
>
> MR. BEARD: We challenge for cause.

The defendant then was allowed to examine Mrs. Rook and the following occurred:

> MR. CHICHESTER: And if after you searched your heart and you went through the facts as you found them, and to pursuant to your duty as under, your -- ah, you match these facts with the law that her Honor gives you. And you came up with

death as an appropriate sentence. Would you be able to follow your oath and return a verdict of the death sentence?

MRS. ROOK: No, sir.

The court then asked the following question:

COURT: Is it your position that before the trial of this matter even begins, that you could not vote for the imposition of the death penalty? That is, the death sentence. No matter what the facts or circumstances may show?

MRS. ROOK: No, ma'am.

COURT: You could not do that?

MRS. ROOK: No, ma'am.

COURT: All right. Thank you. You may step down. That is for cause.

It is clear from the three answers Mrs. Rook gave that she was irrevocably committed not to vote for the death penalty. She was properly excused under Witherspoon.

The defendant contends that in Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985) and Adams v. Texas, 448 U.S. 38, 65 L.Ed.2d 581 (1980), the United States Supreme Court clarified the law so that the test now is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Under this test the juror was properly excused. The defendant argues that the answer the juror gave the court was equivocal, that is that "it is unclear whether Mrs. Rook's '[n]o' answer was '[n]o' she would not under any circumstances vote for the imposition of the death penalty or '[n]o' it is not her position that she would

not vote for the death penalty no matter what the facts or the circumstances were." We believe it is clear from the three answers given by Mrs. Rook that she was irrevocably committed not to vote for the death penalty.

In his fourth assignment of error the defendant contends that the State's use of peremptory challenges to remove jurors who were not disqualified under Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, but who wavered in their ability to impose the death penalty violated his constitutional rights. The defendant contends the Eighth Amendment proscription of cruel and unusual punishment and the Fourteenth Amendment's due process clause require that the defendant have a jury that is not stacked against him. He says that allowing peremptory challenges to such veniremen results in a jury that does not reflect a cross section of the community and violates his rights under the United States Constitution. The defendant relies on Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69 and Gray v. Mississippi, 481 U.S. ___, 95 L.Ed.2d 622 (1987), to support this argument.

Neither Batson nor Gray dealt with the prosecution's use of peremptory challenges to jurors who were not disqualified under Witherspoon, but who wavered in their ability to impose the death penalty. Batson dealt with peremptory challenges used in a racially discriminatory manner. It does not preclude the use of peremptory challenges in any other context. Gray dealt with the erroneous allowance of a challenge for cause. The Court recognized that prosecutors often exercise peremptory challenges to excuse jurors who are hesitant in voting for the death penalty

but may not be challenged pursuant to Witherspoon and the courts do not review this reason for exercising a peremptory challenge. Gray v. Mississippi, 481 U.S. ___, 95 L.Ed.2d 622. In State v. Robbins, 319 N.C. 465, 356 S.E.2d 279 (1987), we said the prosecution can take into account concerns expressed about capital punishment when exercising peremptory challenges. Id. at 494, 356 S.E.2d at 297. We hold it was not error under the Constitution of the United States for the prosecution to use its peremptory challenges to excuse veniremen who had qualms about the death penalty but were not excludable pursuant to Witherspoon.

The defendant argues further that if we hold it did not conflict with the United States Constitution for the State to use peremptory challenges to strike veniremen with qualms about the death penalty, it nevertheless violates Article I, Sections 19 and 24 of the Constitution of North Carolina. We hold that for the same reasons this does not violate the United States Constitution, it does not violate the North Carolina Constitution.

The defendant next assigns error to what he contends was the deprivation of his right to be present at every stage of the trial. During a weekend while the trial was in progress a television station broadcast a news report in which it was said that Mr. Worley's widow did not care or did not want the death penalty imposed on the defendant. In order to be certain the jury was not tainted by this television broadcast the court examined each of the jurors and alternates in her chambers with

only a court reporter present. Following the examination of each of the jurors the court reported to the parties what was said. A transcript of the proceedings was made available to the parties. One of the alternate jurors told the judge that her husband had been in an automobile accident and she had driven to the scene to pick him up. She said her husband told the highway patrolman at the accident scene not to talk to her because she was on the jury. She said she was very cautious at the scene of the accident not to talk to the patrolman.

The defendant, relying on State v. Payne, 320 N.C. 138, 357 S.E.2d 612 (1987), argues that his constitutional right to be present at every stage of the proceeding was violated. He says the State cannot show this was harmless error because there is no way of telling what information he could have obtained from the juror as to her contact with the patrolman had his attorney been present when she was examined by the court in chambers. This juror told the court that during a recess in the trial she drove to the scene of an automobile accident in which her husband had been involved. Her husband told the highway patrolman at the scene not to speak to his wife because she was on the jury. She said she was careful not to speak to the patrolman at the scene. The defendant has not shown us and we can think of no facts which would shed additional light on the question of the influence of the patrolman on the juror. It is clear that the juror had no real contact with the patrolman. We hold that any error which may have been committed by the court was harmless beyond a reasonable doubt. State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972). See N.C.G.S. § 15A-1443(b) (1983).

In his sixth assignment of error the defendant argues it was error to remove one of the jurors during the trial and replace her with an alternate juror. When the court was examining the jurors as to whether they had seen the television program about the trial, it was discovered that a Mrs. Johnson who was on the jury had heard the case discussed by her fellow workers. She had worked at Stephens Textiles for three years and four months and worked on one weekend during the trial. While she was working that weekend, she took a break with approximately seven of her co-workers. She viewed them as her "working partners." During the break two people discussed the case in her presence for ten to fifteen minutes. The discussion was about the trial in general. One of the persons said she did not think the defendant could get a fair trial in Halifax County. After this was said Mrs. Johnson left the room. Mrs. Johnson had been instructed by the court not to discuss the case with anyone or to let the case be discussed in her presence. Based on this information the court excused Mrs. Johnson and replaced her with the alternate who had picked up her husband after he had an accident.

In State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979), it was obvious on a Friday that the case could not be completed that day. The court asked the jury if they could continue on Saturday and one member of the jury said she could not. The court then removed that juror and substituted an alternate. In holding there was no error we said:

> The trial judge has broad discretion in supervising the selection of the jury to the end that both the state and defendant may receive a fair trial.... This discretionary power to regulate the composition of the jury continues beyond empanelment.... These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error. (Citations omitted.)

Id. at 593, 260 S.E.2d at 644. If it was not an abuse of discretion to remove a juror in Nelson in order to keep the trial from going into the next week, then it was not an abuse of discretion here to remove a juror who had heard other people discuss the case; and we so hold. See also State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, ___ U.S. ___, 100 L.Ed.2d 935 (1988) and State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

In his seventh assignment of error the defendant argues it was error to allow Mr. Worley's widow to testify as to her feelings when she heard of the shooting. During Mrs. Worley's testimony the prosecuting attorney asked her how she felt when she heard her husband had been killed. Over the defendant's objection Mrs. Worley testified, "I was hurt and I was mad; disgusted." The defendant argues that this evidence was irrelevant on any issue in the case and its sole tendency was to inflame the jury on both the guilt and penalty phase of the trial. The defendant cites Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440 (1987), for the proposition that the emotional impact on the family may not be considered in the penalty phase of a capital case. We hold that if this testimony was admitted in

error it was harmless beyond a reasonable doubt. It is hard to believe any juror would not know without this testimony that Mr. Worley's wife would be at least hurt, mad and disgusted when she heard he had been killed. The defendant could not have been prejudiced by the admission of this evidence.

In his eighth assignment of error the defendant contends it was error to allow a .38 caliber pistol to be passed among the jury and tested by the members of the jury as to its pull for single and double action. The pistol had been identified as the weapon with which Mr. Worley was shot and it was introduced into evidence. We are bound by State v. Walden, 311 N.C. 667, 319 S.E.2d 577 (1984), to overrule this assignment of error. In Walden a shotgun was introduced into evidence and the court instructed the jury as follows: "[y]ou may look at the weapon, if you like, and use the hammer to cock it, if you desire." Id. at 675, 319 S.E.2d at 582. In finding no error we said, "[w]e can see no reason why a prosecutor should not be allowed to suggest to a jury how it should examine real evidence, so long as he does not give his opinion as to the proof of a fact or state facts not in evidence." Id. at 676, 319 S.E.2d at 583.

The defendant, relying on State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979); State v. Hunt, 80 N.C. App. 190, 341 S.E.2d 350 (1986); and State v. Graham, 38 N.C. App. 86, 247 S.E.2d 300 (1978), argues that the conditions under which the jury was allowed to experiment with the weapon were different from the conditions under which the pistol was allegedly fired on the roadside. In Mayhand we found no reversible error in

allowing a prosecuting witness to sit in the lap of an officer to demonstrate the position she was in when she was raped. In Graham the Court of Appeals ordered a new trial when a prosecutor put a shirt, worn by the defendant at the time of the alleged shooting, in front of a defendant and directed him to cut the shirt with a knife. In Hunt the Court of Appeals found no error when a police officer, who testified he was not an expert, was allowed to demonstrate the operation of the weapon allegedly used in an assault and give his opinion that the gun would not fire unless the hammer was cocked and the trigger pulled.

In Hunt, Judge Becton, writing for the panel, made a distinction between a demonstration and an experiment. He defined a demonstration as "an illustration or explanation, as of a theory or product, by exemplification or practical application." He defined an experiment as "a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried." Hunt, 80 N.C. App. at 193, 341 S.E.2d at 353. We believe the evidence challenged by this assignment of error is more in the nature of a demonstration than an experiment. We agree with Judge Becton that the test of the admissibility is as set forth in N.C.G.S. § 8C-1, Rule 403. If the evidence is relevant it will be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

The defendant next argues that the court committed reversible error by not intervening ex mero motu to stop certain

arguments by the prosecution to the jury at the guilt phase of the trial. Ordinarily, objection to the prosecutor's jury argument must be made prior to the verdict in order for the alleged impropriety to be reversible on appeal. State v. Brock, 305 N.C. 532, 290 S.E.2d 566 (1982). In the absence of such objection, we will review the prosecutor's argument to determine only whether it was so grossly improper that the trial court abused its discretion in failing to intervene ex mero motu to correct the error. We have said:

> "We have consistently held that counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case. Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury. Even so, counsel may not employ his argument as a device to place before the jury incompetent and prejudicial matter by expressing his own knowledge, beliefs and opinions not supported by the evidence[.] It is the duty of the trial judge, upon objection, to censor remarks not warranted by the evidence ... and, in cases of gross impropriety, the court may properly intervene, ex mero motu." (Citations omitted.)

State v. Williams, 314 N.C. 337, 358, 333 S.E.2d 708, 722 (1985) (quoting State v. Covington, 290 N.C. 313, 327-28, 226 S.E.2d 629, 640 (1976)).

State v. Jones, 317 N.C. 487, 500-01, 346 S.E.2d 657, 664-65 (1986).

The assistant district attorney appearing in this case argued:

> He will hide behind the Constitution of this country that protects all of us. Not just selected ones of us, but all of us. But it's not something for a criminal to hide behind.
>
> The Constitution of this land has been complied with. The judge has ruled on the admissibility of the confession, and it has come before you. The only thing left for you to decide right now is was it true.

The defendant argues that the prosecution invited the jury to disapprove of the defendant for relying on his constitutional rights. He says the State is not allowed to obtain a conviction by punishing a defendant for relying on his constitutional rights. The defendant relies on Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91 (1976), which holds that the defendant's silence after receiving Miranda warnings cannot be used against him and Griffin v. California, 380 U.S. 609, 14 L.Ed.2d 106 (1965), which holds the State cannot comment on the defendant's failure to testify. Doyle and Griffin deal with a specific constitutional right which would be infringed if comments are made about it. A general comment about constitutional rights as was made in this case does not rise to the same level. It is certainly not such a gross impropriety that the court should have intervened ex mero motu.

The defendant next says that by arguing that the judge had ruled upon the admissibility of the confession the assistant district attorney argued that the judge had held the confession was valid and the jury should accept this ruling as to the

validity of the confession. When the defendant challenged the confession the judge had to rule on its admissibility. When she ruled it was admissible the jury then had to pass on its truthfulness. This is what the assistant district attorney told the jury and it was not error for the court not to intervene.

The assistant district attorney also argued:

> [The defendant] was looking [out for] himself [by minimizing his culpability], the same as he had been when he went in there and said, "Well, I think maybe I need a lawyer." That was a feeler. That was, that was for number one, you put it out there and see how [the officers] react. Are they going to deal with me on this?

The defendant argues that the right to counsel was a constitutional right and the prosecution may not be allowed to characterize it as something nefarious. The manner in which the defendant delayed his request for an attorney could give rise to the inference for which the State argued. It was not error for the court not to intervene ex mero motu.

At one point the assistant district attorney argued, "[y]ou have to believe now, that this man is telling you the truth and these officers are the ones who made it all up." The defendant first argues that this shifts the burden of proof to the defendant because the prosecutor told the jury they would have to find the defendant guilty unless the defendant proved the officers were lying. He also says that it was not his contention that he did not tell the officers he shot Mr. Worley but that he had not been truthful when he told them he had done so. In many cases the outcome of a case depends on which of the witnesses is to be believed. It does not shift the burden of proof for an

attorney to argue to a jury that it should believe one witness rather than another. There was sufficient conflict in the testimony for the assistant district attorney to argue as she did.

The district attorney argued to the jury that the defendant's attorney had commented on the fact that the others involved in the incident with the defendant had not testified. The district attorney then told the jury that they would not survive in prison if they had testified against the defendant. The defendant contends the most likely reason they did not so testify was that they were afraid of implicating themselves and under no circumstances should the prosecutor have speculated on this matter which was not in evidence. The inference which the district attorney made was not so unreasonable that the court should have intervened ex mero motu and stopped the argument.

The defendant's ninth assignment of error is overruled.

In the tenth assignment of error the defendant argues it was improper for the district attorney to argue that the jury should consider the bravery of the law enforcement officers who captured the defendant before he could go into the jurors' homes or rob or hurt someone, that the widow of the deceased highway patrolman had done her painful duty by coming to court each day to see that justice was done, that the law enforcement officers across the state expected the jury to do its duty, and that unless the jury did its duty by recommending death, the jurors would be telling law enforcement officers that their lives and services were without value. One of the aggravating

circumstances to be considered in determining whether to impose the death penalty is that the person killed was a law enforcement officer in the performance of his official duty. N.C.G.S. § 15A-2000(e)(8) (1983). This argument was proper to focus the jurors' attention on this aggravating factor. It is not, as argued by the defendant, an appeal to the jury to impose the death penalty because that is what is desired by the public, an argument which we held to be improper in State v. Scott, 314 N.C. 309, 333 S.E.2d 296 (1985).

The district attorney argued at one point:

> First of all, the State has to prove the existence of some aggravating circumstances. Now, the aggravating circumstances that the State can submit to you are set out by statute. They were set out by the Legislature and they've been approved by the Supreme Court. These aggravating circumstances that will be submitted to you have already been set out in the statute but what you have to decide is whether ... these aggravating circumstances exist in this case. I'm confident that you will find that two aggravating circumstances do exist and two aggravating circumstances are all that will ... be submitted to you.

The defendant argues that because the district attorney said the two aggravating factors had "been approved by the Supreme Court," it conveyed to the jury the idea that the Supreme Court commended these aggravating factors to the jury. When read in context we believe this is not the reasonable interpretation. The district attorney told the jury the General Assembly had adopted these aggravating factors and this Court has held they are proper aggravating circumstances. It is the jury, however, which must determine whether they exist. We do not think this argument

misled the jury regarding the manner in which it was to consider this aggravating circumstance.

This assignment of error is overruled.

In his eleventh assignment of error the defendant contends the court should have submitted to the jury the statutory mitigating circumstance set forth in N.C.G.S. § 15A-2000(f)(6), that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. We dealt with this mitigating circumstance in State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979). We said impaired mental capacity would exist "if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished)." Id. at 68, 257 S.E.2d at 613.

The defendant contends there was sufficient evidence of his impaired mental capacity to submit this mitigating factor to the jury. He says the evidence shows he was a heroin user and had taken a drug three or four hours before the shooting. There were beer cans found in the van in which the defendant was riding. Mr. Thompson testified that during the interrogation, the defendant said he had taken drugs the day before the shooting and "felt bad," although he was not experiencing withdrawal symptoms. The defendant testified he told Mr. Thompson that "he was experiencing withdrawal symptoms, was sick and requested a

doctor." A Dr. Brown was called to the jail because the defendant had vomited and may have had withdrawal problems. Dr. Brown testified that when he saw the defendant he did not notice any withdrawal symptoms but prescribed some medicine for heroin withdrawal. The defendant testified when asked if he was suffering withdrawal symptoms from heroin use, "[m]aybe at that particular moment, no, sir, but I had been feeling bad so I knew later on that I would be withdrawing, yes, sir." There was no expert testimony as to the defendant's diminished capacity.

The fact that defendant may have taken a drug several hours before the shooting or that he may have drunk some beer is not sufficient alone to show a diminished capacity to appreciate the criminality of the offense or to refrain from illegal conduct. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). The defendant has shown no more than this. It was not error not to submit this mitigating circumstance to the jury.

The defendant next contends it was error for the court to charge the jury that they must be unanimous before they could find a mitigating circumstance to exist. The defendant bases this assignment of error on Mills v. Maryland, ___ U.S. ___, 100 L.Ed.2d 384 (1988), which dealt with the finding by a jury of mitigating circumstances in a capital case. Oral arguments in this case were heard prior to the date of the decision of the United States Supreme Court in Mills. As a result of that decision we ordered that new briefs be filed and additional oral arguments made in this case. For the reasons expressed in State v. McKoy, ___ N.C. ___, ___ S.E.2d ___ (no. 585A85, filed 7 September 1988), we reject defendant's argument based on Mills.

The defendant also argues under separate assignments of error three issues which he recognizes have been determined against his position in previous cases. He asks that we find error because (1) he was not allowed to inform the jury that if they did not reach a unanimous verdict the defendant would be sentenced to life in prison, (2) he was denied a bill of particulars as to what aggravating circumstances would be submitted to the jury, and (3) the court submitted as aggravating factors that the murder was committed to avoid arrest and the murder was committed against a law enforcement officer in the performance of his duties. He contends these two aggravating factors are duplicative.

The defendant concedes this Court has rejected all three contentions in several cases including State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987) for his first contention, State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985) for his second contention, and State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981) for his third contention. We decline to overrule any of these cases.

PROPORTIONALITY REVIEW

Having determined there was no error in the guilt or penalty phase of the trial sufficient to require a new trial or sentencing hearing, we are required by N.C.G.S. § 15A-2000(d)(2) to determine (1) whether the record supports the jury's finding of the aggravating circumstance upon which the sentence of death was imposed, (2) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor,

and (3) whether the sentence is excessive or disproportionate to the penalty imposed in the pool of similar cases, considering both the crime and the defendant.

We have thoroughly examined the record, transcripts, and briefs in this case. We find that the record clearly supports the submission of the aggravating circumstances considered and found by the jury. Further, we find no indication at all that the death penalty was imposed under the influence of passion, prejudice or arbitrary factors.

We turn then to our final statutory duty of proportionality review. In dealing with a review as to whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant" in State v. Williams, 308 N.C. 47, 301 S.E.2d 335, cert. denied, 464 U.S. 865, 78 L.Ed.2d 177, reh'g denied, 464 U.S. 1004, 78 L.Ed.2d 704 (1983), this Court said it would use a "pool" of cases which included:

> [A]ll cases arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

Id. at 79, 301 S.E.2d at 355. This pool includes only those cases which this Court has found to be error free in both phases of trial. State v. Jackson, 309 N.C. 26, 45, 305 S.E.2d 703, 717 (1983).

In State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 86 L.Ed.2d 267 (1985), we said that in comparing a case with those in the pool, we would limit our consideration to those cases "roughly similar with regard to the crime and the defendant." We also said:

> If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

Lawson, 310 N.C. at 648, 314 S.E.2d at 503.

With the magnitude and seriousness of our task in mind, we have reviewed the facts and circumstances of this case and compared them to other cases in the proportionality pool. The distinguishing features of the present case are: (1) it is the first degree murder of a law enforcement officer while engaged in the performance of his duty; (2) it is a case in which the motive for the murder was to avoid lawful arrest; (3) it is a case in which the murder was preceded by a violent course of conduct (i.e., multi-state crime spree); and (4) it is a case in which the defendant appeared in control of his mental and physical faculties before, during, and after the killing and gave a knowing and voluntary confession thereto.

Our careful analysis of the pool reveals a total of seven cases in which a defendant was charged with the murder of a law enforcement officer. Those cases are State v. McKoy, ___

N.C. ___, ___ S.E.2d ___ (No. 585A85, filed 7 September 1988); State v. Bray, 321 N.C. 663, 365 S.E.2d 571 (1988); State v. Rice, 322 N.C. 596, 369 S.E.2d 576 (1988); State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985); State v. Hill, 311 N.C. 465, 319 S.E.2d 163 (1984); State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983); and State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981). Of these seven cases, in three, Hutchins, Hill and McKoy, did the jury recommend death.

In State v. Hill, 311 N.C. 465, 319 S.E.2d 163, defendant was charged and convicted of the first degree murder of a Hendersonville police officer. Following the jury's recommendation and the trial court's sentence of death, this Court vacated the sentence holding it to be disproportionate pursuant to N.C.G.S. § 15A-2000(d)(2). In support of this decision, the Court in Hill cited the speculative nature of the evidence surrounding the murder, not only as to the defendant's whereabouts at the time of the murder but also as to what he might have been doing just prior to his encounter with the officer. Likewise, the Court cited the lack of evidence as to who drew the murder weapon out of the officer's holster. The Court in Hill further focused its attention on the failure to submit N.C.G.S. § 15A-2000(e)(4) (that the murder "was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody") as an aggravating circumstance for the jury's consideration. Thus, given the speculative nature of the evidence surrounding the murder, the apparent lack of motive, and the short amount of time involved in the murder

itself, the Court in Hill ordered the defendant sentenced to life imprisonment in lieu of the death sentence.

In contrast to the holding in Hill, this Court in State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788, affirmed the trial court's sentence of death. Hutchins involved the murder of three law enforcement officers, two of which were first degree murder convictions. The jury found three aggravating factors: (1) that the murder was committed to avoid lawful arrest; (2) that the murder was committed against a law enforcement officer while engaged in the performance of his duties; and (3) the murder was part of a course of conduct involving crimes of violence. The Court further cited the clear evidence of guilt and the defendant's conduct and wanton disregard for the value of human life and for the enforcement of the law by duly appointed authorities.

As previously mentioned, defendant offered three other cases for our proportionality review as they relate to the case at bar: State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100, involved a conspiracy to commit an armed robbery by defendant and five other co-defendants. While defendants were committing the robbery, a law enforcement officer entered the store to make a purchase whereupon he was shot several times and left to die. Although finding four aggravating factors ((1) defendant had previous convictions of violent crimes, (2) the murder was committed to avoid arrest, (3) the murder was committed while engaged in an armed robbery, and (4) the murder was committed against a law enforcement officer while in the line of duty), the

jury refused to impose the death sentence. The defendant introduced evidence to cast doubt on the credibility of the co-defendants who turned State's evidence against defendant Abdullah. This was especially true in light of the jury's knowledge that the co-defendants received lesser sentences. Thus there appeared to be some residual doubt in the jury's mind which led to its refusal to impose the death penalty.

Likewise in State v. Payne, 312 N.C. 647, 325 S.E.2d 205 and State v. Bray, 321 N.C. 663, 365 S.E.2d 571, the participation in the crimes and subsequent testimony of the co-defendants cast some doubt as to whether the victims' deaths in each case were a result of the acts of one or several. We believe this degree of residual doubt necessarily influenced the jury's decision to recommend a life sentence in each case.

Considering all of the cases in the proportionality pool, but more specifically the aforementioned seven, we believe that the present case compares most favorably to Hutchins, while being distinguishable in several respects from Hill, Abdullah, Payne and Bray.

As previously mentioned, in Bray, Abdullah, and Payne, the evidence was far more equivocal as to the degree of the defendant's culpability than it is here. It was such that it could have created a residual doubt in the minds of the jury as to the defendant's culpability. Likewise in Hill, this Court voiced the same kind of doubt in setting aside the sentence of death in favor of that of life imprisonment. Although there is some evidence that one of defendant Allen's co-defendants in the

case at bar may have been involved in the actions at the patrol car, the evidence that the defendant was the person who pulled the trigger and killed Mr. Worley while he was in a defenseless position is relatively overwhelming. Any doubts to the contrary are largely dispelled by the voluntary and knowing confession of the defendant a short time after the events of 14 May 1985.

Thus, we hold that the case at bar aligns itself more closely with the facts and the defendant in Hutchins. In Hutchins, as in the present case, the defendant exhibited a course of conduct that was without regard for the law or its enforcement. This course of conduct culminated in the murder of a law enforcement officer while in the line of duty and was motivated by a desire to avoid or prevent an arrest (both factors being found by the jury as aggravating circumstances). In the present case, the killing was cold-blooded, unprovoked, and unjustified. The defendant, although not required to do so, stopped behind a highway patrolman, took a pistol from his van and as the trooper reached over in a defenseless position, shot him point blank three times resulting in the victim drowning in his own blood. This murder was the result of an intentional, knowing act of a responsible adult.

After a careful consideration of the briefs, transcripts, and record, we conclude that the sentence of death is not disproportionate or excessive, considering both the crime and the defendant. We therefore decline to disturb the sentence imposed.

NO ERROR.

No. 70A86 - State v. Allen.

FILED
1988 OCT -6 AM 10: 39
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OF NORTH CAROLINA

Chief Justice EXUM dissenting as to sentencing.

The majority concludes the sentencing hearing jury instructions on the unanimity requirement do not violate the federal constitution as interpreted in Mills v. Maryland, 486 U.S. ___, 100 L.Ed. 2d 384 (1988), on the basis of this Court's decision on this issue in State v. McKoy, ___ N.C. ___, ___ S.E.2d ___ (No. 585A85, filed 7 September 1988). For the reasons stated in my dissenting opinion in McKoy, I disagree with this conclusion and vote, because of this error in the instructions, to give defendant a new sentencing hearing.

When the majority in McKoy concluded that Mills had no application to North Carolina's jury instructions on unanimity, it relied in part on the United States Supreme Court's having denied certiorari in two North Carolina cases in which these instructions formed the principal basis for the defendant's petition for the writ. The majority said:

> The Supreme Court granted certiorari in Mills "[b]ecause of the importance of the issue in Maryland's capital-punishment scheme." Id. at ___, 100 L.Ed. 2d at 393. The decision in Mills thus appears to be statute-specific. This conclusion is further supported by the Court's treatment of three cases immediately after the decision in Mills. The Court denied certiorari in two cases from this state which raised the issue of whether North Carolina's requirement of jury unanimity on the existence of mitigating circumstances is unconstitutional. See State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, ___ U.S. ___, 100 L.Ed. 2d 935 (1988); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1983), cert. denied, ___ U.S. ___, 100 L.Ed. 2d 934 (1988). However, in a Maryland case raising the same issue as in Mills, the Court granted certiorari, vacated the judgment, and remanded for further consideration in light of Mills. See Jones v. Maryland, 310 Md. 569, 530 A.2d 743 (1987), cert. granted and judgment vacated, ___ U.S. ___, 100 L.Ed. 2d 916 (1988). We recognize that "a denial of a petition for a writ of certiorari . . . carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." Maryland v. Baltimore Radio Show, 338 U.S. 912, 919, 94 L.Ed. 562, 566 (1950) (Frankfurter, J., opinion re: denial of certiorari); see also Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 944, 58 L.Ed. 2d 335, 336 (1978) (Stevens, J., opinion re: denial of certiorari). We do not suggest that the denial of certiorari in Holden and Gardner alone indicates that the Court decided that the defendants' arguments in those cases were without merit. However, we view the Court's action on Jones and its different treatment of Holden and Gardner, all in the immediate wake of Mills, as some indication that our capital-sentencing procedure differs sufficiently from Maryland's that Mills does not control the question presented here.

McKoy, slip op. at 53-54.

On 3 October 1988 the United States Supreme Court entered the following order in Oscar Lloyd v. North Carolina, No. 87-6833 (our State v. Lloyd, 321 N.C. 301, 374 S.E.2d 316 (1988)):

> The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of Mills v. Maryland, 486 U.S. ___ (1988).

This order was granted on the basis of (1) Lloyd's petition for writ of certiorari filed in April 1988 (before the decisions in Mills and McKoy), which relied solely on the assertion that North

Carolina's unanimity jury instructions for mitigating circumstances in capital cases violated Lloyd's Eighth and Fourteenth Amendment rights and (2) a supplemental brief filed in September 1988 calling the Court's attention to its decision in Mills and our decision in McKoy.

To the extent the McKoy majority relied for its conclusion on the United States Supreme Court's denial of petitions for certiorari in other North Carolina cases involving the unanimity jury instruction issue, that conclusion has been substantially undercut by the United States Supreme Court's action in Lloyd. The Lloyd order, considered with the filings upon which it rests, renders the conclusion reached in McKoy--that Mills has no application to North Carolina's unanimity jury instructions--far more untenable than it otherwise was.

I concur in the result reached by the majority on the guilt phase issues.

Justice Frye joins in this dissenting opinion.

NO. 88-5909

IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM, 1988

DOCK McKOY, Petitioner, v. STATE OF NORTH CAROLINA Respondent.	)	AFFIDAVIT OF MAILING

STATE OF NORTH CAROLINA
COUNTY OF WAKE

JOAN H. BYERS, being sworn says:

1. I am a Special Deputy Attorney General for the State of North Carolina.

2. On January 30, 1989 I personally placed the original and nine copies of the enclosed brief of respondent State of North Carolina in opposition to petition for writ of certiorari to the Supreme Court of the United States in an envelope properly addressed to the Clerk of this Court, with first class postage prepaid, and deposited the envelope in a mailbox belonging to the United States Postal Service within the City of Raleigh, North Carolina.

Joan H. Byers
Special Deputy Attorney General General

Sworn to before me this
30th day of January, 1989.

Notary Public

My Commission Expires: 12-21-93

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SUPREME COURT, U.S.

88-5909

CERTIFICATE OF SERVICE

I hereby certify that I have served the annexed Petition for Certiorari and Motion for Leave to Proceed *In Forma Pauperis* on respondent by placing copies in the state courier service, addressed to: William N. Farrell, Jr., Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina.

This 14th day of November, 1988.

Marshall Dayan

Marshall Dayan